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In The

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1955

NO. 494

CHARLES T. CROWDER,
Appellant
v.
COMMONWEALTH OF VIRGINIA,
at the relation of the
STATE CORPORATION COMMISSION,
Appellee

GEORGE H. ELLIS,
Appellant
v.
COMMONWEALTH OF VIRGINIA,
at the relation of the
STATE CORPORATION COMMISSION,
Appellee

STATEMENT AS TO JURISDICTION WITH APPENDIX

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APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

STATEMENT AS TO JURISDICTION

In compliance with Rule 15 of the Rules of the Supreme Court of the United States, as amended, appellants submit

herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the final judgment of the Supreme Court of Appeals of Virginia in this cause.

(a) Opinion Below:

The opinion of the Supreme Court of Appeals of Virginia appealed from was rendered June 13th, 1955, and is reported in 197 Va. 96, 87 S. E. (2d) 745. A copy of the opinion is attached hereto as Appendix A.

(b) Grounds on Which Jurisdiction is Invoked:

(i) These causes originated in the State Corporation Commission of Virginia upon citation to each of appellants to show cause why each should not be fined and his right to operate motor vehicles over the highways of Virginia suspended or revoked under Section 58-642 of the Code of Virginia,—not in issue here—, for refusal to pay gross receipts road taxes of two per centum assessed pursuant to Section 58-638 of the Code of Virginia (set forth verbatim below), arising from the sole and exclusive carriage of United States mail by motor vehicle by agreement with, and under direction of, the Postmaster General, returnable May 10th, 1954. From the decisions of the Commission holding appellants amenable to the tax and assessing a fine of $250.00 each, unless the taxes asserted to be due be paid on or before September 3rd, 1954, appellants appealed as of right to the Supreme Court of Appeals of Virginia.

(ii) The Supreme Court of Appeals of Virginia sustained the order of the Commission, by judgments entered June 13th, 1955. Notice of appeal was filed in the Supreme Court of Appeals of Virginia September 2nd, 1955.

(iii) The jurisdiction of the Supreme Court of the United States to review this decision by appeal is conferred by Section 1257(2) of the Judicial Code and Judiciary (28 U. S. C. 1257(2)), as the decision was rendered by the highest court of the State of Virginia in which a decision could be had, and there was drawn in question the validity of Section 58-638 of the Code of Virginia on the ground of its being repugnant to the Constitution of the United States, Art. I, Sec. 8, Clauses 3 and 7, and the decision was in favor of its validity.

(iv) The following decisions sustain the jurisdiction of the Supreme Court to review the judgment by appeal in this cause: *Richfield Oil Corporation* v. *State Board of Equalization*, 329 U. S. 69 (1946); *Cities Service Gas Co.* v. *Peerzation*, 340 U. S. 179 (1950); *Dean Milk Co.* v. *City of Madison, Wis., et al.*, 340 U. S. 349 (1951); *Niemotko* v. *State of Maryland*, 340 U. S. 268 (1951); *Western Maryla id Railway Co.* v. *Rogan*, 340 U. S. 520 (1951); *California State Auto. Ass'n Inter-Insurance Bureau* v. *Maloney, Inc. Commissioner*, 341 U. S. 105 (1951); and *Hughes* v. *Fetter, et al.*, 341 U. S. 609 (1951).

(v) The validity of Section 58-638 of the Code of Virginia of 1950, Vol. 8, page 513, is involved and its text is as follows:

> "Except as hereinafter otherwise provided, every person who operates, or causes to be operated, on any highway in this State, any motor vehicle, trailer or semi-trailer for the transportation of property for compensation, whether for rent, or for hire, or as a contract carrier, or as a common carrier, and every common carrier by motor vehicle, trailer or semi-trailer of pas-

sengers, shall pay quarterly to the State Treasurer, on or before the fifteenth day of April, July, October and January of each year, in addition to any other fees and taxes imposed by law upon motor vehicles, trailers and semi-trailers, and upon the operation thereof, and in addition to any motor fuel tax paid or payable by such person, a road tax calculated on the gross receipts derived from such operations during the quarter year ending with the preceding month, according to the following schedule:

"(1) Two per centum of the gross receipts derived by such person from all intrastate operations; and

"(2) Two per centum of such proportion of the gross receipts derived by such state operations by the vehicles of such person on the public highways of this State bears to the total number of miles traveled in interstate operations by the vehicles of such person both within and without this State, including miles traveled on streets in cities and towns embraced within the highway system of this State, but exclusive in each case of the miles traveled in this State on any street maintained exclusively by any city or town.

"All taxes so collected shall be credited to the highway maintenance and construction fund.

"The provisions of this section shall apply for the tax year beginning January first, nineteen hundred forty-nine, and annually thereafter until otherwise provided by law."

(c) The Question Presented By This Appeal:

The federal question presented to the State Corporation Commission, the Supreme Court of Appeals of Virginia

and on this appeal is:

Whether the Commonwealth may tax the gross receipts from the sole and exclusive carriage of United States mail by motor vehicle over the highways of Virginia under authority of Section 58-638 of the Code of Virginia.

(d) Statement of The Case:

Appellants are residents and taxpayers of Virginia and each has been engaged over a long number of years solely and exclusively in the transportation of United States mail by motor vehicles over the highways of Virginia from the Cities of Norfolk and Suffolk, Virginia, to various postal destinations in Virginia and North Carolina, and return with like burden, by separate agreements with the Postmaster General, cancellable at his will.

The routes and schedules are fixed, and may be altered, by the Postmaster General from time to time, and the entire operations are subject to the provisions of the Postal Laws and Regulations, and consequently subject to order of the Postmaster General. Neither is engaged in any other business, nor transports any other property of any nature. Each employs his operators, pays social security, provides Virginia license plates, pays tax on gasoline in Virginia, pays property taxes on the vehicles used and has no exemption plate or certificate of public convenience and necessity. Neither has ever been called upon to pay gross receipts taxes or file any reports arising out of his operations until January 1954.

The Commonwealth then audited the accounts of appellants, ascertained Crowder to be indebted under Section 58-638 of the Code in the amount of $3,200.70, for the

period beginning January 1st, 1951, through December 31st, 1953, inclusive of penalty and interest to January 22nd, 1954, arising out of the operation of motor vehicles carrying United States mail over the highways of Virginia. A like assessment differing only in amount was made against George H. Ellis.

Appellants refused to pay the assessments so made and each was summonsed before the State Corporation Commission, pursuant to Section 58-635 of the Code of Virginia, to show cause why each should not be fined and his right to operate motor vehicles over the highways of Virginia suspended or revoked under Section 58-642 of the Code, retu nable May 10th, 1954.

At the hearing the appellants moved to strike the evidence of the Commonwealth on the ground that the Commission was without jurisdiction in the premises, in that the appellants were engaged in the performance of a Governmental function in operating motor vehicles solely and exclusively in the carriage of United States mail.

The Commission overruled the appellants' motion and on June 25th, 1954, rendered judgment that each appellant be fined the sum of $250.00, and costs, unless on or before September 3rd, 1954, each pay the gross receipts road tax asserted by the Commonwealth to be due (Appendix B).

From the decision in each case the appellants appealed to the Supreme Court of Appeals of Virginia.

The issue as to invalidity of the tax was raised on appeal in the Assignment of Error and statement of Question involved, set forth in appellants' opening brief, as required

by Rule 5.11 of the Rules of the Supreme Court of Appeals of Virginia.

The Supreme Court of Appeals of Virginia, in its opinion rendered June 13th, 1955, held that Section 58-638 of the Code was not repugnant to the Commerce and Postal Clauses of the United States Constitution, (Article I, Section 8, clauses 3 and 7), since appellants were independent contractors and not exempt from the tax imposed by Section 58-638 of the Code, despite the exclusive jurisdiction of Congress over post roads and post routes. (Appendix A).

Appellants are appealing from that decision on the constitutional issue stated.

(e) Grounds Upon Which It Is Contended That The Federal Question Presented Is Substantial:

The Commonwealth attempts to draw a line between gross receipts from intrastate and interstate carriage of mail. There can be no such distinction. Mail is either domestic or foreign. In either case it is immune from interference of any nature by the several states, consequently the adverse rulings of the Supreme Court of Appeals of Virginia (Appendix A) being repugnant to Article I, Section 8, Clauses 3 and 7, of the United States Constitution, were such as to bring these cases within the jurisdictional provision relied on and the cases cited in support thereof (subparagraph (b) (iv), *supra*).

A like question has never presented to any Court heretofore and the reasons why the question presented is so substantial as to require plenary consideration for its resolution appear above and follow.

It will be observed that under Section 58-638, *supra*, the

tax is two per centum of the gross receipts upon the *operations* of a motor vehicle for transportation of property "*in addition* to any other fees and taxes imposed by law upon motor vehicles, trailers and semi-trailers, *and upon the operation thereof*, and *in addition* to any motor fuel tax paid or payable by such person, *a road tax calculated on the gross receipts derived from such operations* * * *." (Italics supplied).

It is strictly then a tax on the privilege of the use of the highways and a tax on gross income from the transportation of mail thereover and falls in the same or higher category as gross income derived from transportation of interstate commerce, because the carriage of mail is strictly a Governmental function exclusively federal. The freedom of the mails is a vital and indispensable part of the economic life and political existence of the United States. The powers to keep the channels of interstate commerce open and to provide for the uninterrupted and continuous carriage of United States mail were cardinal considerations in the adoption of our Constitution.

The tax here is not upon the property used in carrying out a Governmental function, but upon operations required therefor, hence upon the operation itself, and constitutes a burden thereon.

A tax upon the *property* used in the carriage of the mail in connection with the operations of a common carrier was held to be valid in *Alward* v. *Johnson*, 282 U. S. 539, 51 S. Ct. 273, 75 L. Ed. 495, but that case did not consider, nor by inference could it be said to be any authority for, a tax upon the gross income derived from the carriage of United States mail, or the privilege to use the highways therefor.

This Court has consistently distinguished between a tax upon property and the agency, or means, used to carry out a Government operation, so long as the tax did not affect the operation itself, but in no case has this Court ever held a tax upon the gross income derived from performing an intimate necessary Governmental function to be valid.

It has also ever been careful to protect interstate commerce, *a fortiori*, should it protect the carriage of the United States mail from a tax which may, by the ukase or ill-advised Legislation of some State, subject it to a tax burdensome in carrying out of the Governmental function itself.

In *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321 (328-329), this Court in discussing the significant difference between a tax measured by gross receipts and one measured by net income said:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large."

Conceivably, and probably, if the Commonwealth of Virginia can lay a tax upon the gross receipts from the carriage of the United States mail—and such carriage does not depend on whether it is interstate or intrastate—then the way is open to every State in the Union to lay a similar tax and thereby drive the highway transportation of mail from the roads.

It may be well for the Commonwealth to argue that the State is entitled to charge transporters of mail for the use of the highways. The same argument could be advanced for the transportation of any Government property, cannons, ammunition, mail, supplies, money, currency, or the operation of any vehicle, until each State became a port of entry.

This argument is fallacious and without merit in that all Federal aid to highways stems from the Federal Aid Act of July 11, 1916, c. 241, 39 Stat. 355, and from the Act of November 9, 1921, c. 119, which is entitled "An Act To amend the Act entitled 'An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes,' approved July 11, 1916, as amended and supplemented, and for other purposes," and from this Act to the present Acts, constituting Federal aid to highways, (Title 23, U. S. C. A.) all such aid has been provided by the Federal Government as could reasonably be required of it to pay its way for the use of State highways for postal service and transport.

It cannot be said then that the State is equitably or legally entitled to any contribution by levy upon the gross receipts from the carriage of United States mail over the highways.

As stated, there are no cases concerning tax upon the

gross income from the carriage of United States mail, but those cases dealing with a tax upon the privilege of engaging in interstate commerce and hence upon the carriage itself are apropos. If this Court has held that interstate commerce is exempt from direct tax on gross receipts derived from interstate commerce, with even greater force it should hold invalid a direct tax on gross receipts from the carriage of United States mail.

There are numerous cases in which a tax, on *gross* receipts and a similar tax on the carriage of persons and property have been held to be *privilege*,—and consequently an invalid,—tax rather than property tax.

In *New Jersey Bell Telephone Co.* v. *New Jersey*, 280 U. S. 338 (1930), a telephone company, part of the business of which was in interstate and foreign commerce, was taxed *ad valorem* on its real and personal property and was subjected to a franchise tax of 5% of the gross receipts apportioned to New Jersey. The statute called the tax a *franchise* or privilege tax, and the state sought to support it as a tax on *property* represented by the value of the company's franchise. The Court held that it was not a property tax:

> "We think it very plain that the exaction is not a tax on property nor in substitution for or in lieu of a property tax. Within the rule heretofore applied in this Court the exaction is a direct tax on gross receipts derived from appellant's interstate commerce and, as to that part at least, is void. *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 345. *Galveston, H. & S. A. R. Co.* v. *Texas, supra*, 227. *Meyer* v. *Wells, Fargo & Co.*, 223 U.S. 298. *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335. *Crew Levick Co.* v. *Pennsyl-*

vania, 245 U. S. 292, 295, 297. *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450. *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321, 329. *Pullman Co.* v. *Richardson, supra.*" (p. 349)

Of especial significance is *American Barge Line Co.* v. *Koontz,* 68 S. W. (2d) 56 (W. Va. 1951), in which the Supreme Court of that State held that an annual *privilege* tax based on *gross* income from the business of transporting passengers and freight by steamboat was clearly a *privilege* tax on interstate commerce in contravention of the Commerce Clause of the Federal Constitution. This case represents the reverse of the conclusions of the Supreme Court of Appeals of Virginia in the case at bar and so presents a conflict between the respective Supreme Courts of the two states which should be resolved by this Court so that uniformity of taxation will be achieved.

In *Ohio Tax Cases,* 232 U. S. 576 (1914), the Supreme Court held that a tax on gross intrastate earnings of railway companies, in addition to the taxes on their property, was a *privilege* or *occupation* tax and not a *property* tax, and in *Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298 (1912), a gross revenue tax on public service corporations, including express companies, was held not to be a tax upon the property of express companies.

The Supreme Court of Appeals of Virginia held that appellants were independent conrtactors and therefore amenable to the tax, but whether they are independent contractors or not is beside the point, if, in fact, the appellants were engaged in the performance of a Governmental function. The tax is upon this Governmental function or a tax upon using the highways of Virginia for the performance thereof, or a tax upon the gross receipts derived therefrom, since to

hold otherwise would result in the tax being upon the contract itself.

The appellants are not independent contractors, however, because their contract must be performed under the supervision and control of the Postmaster General, whose duties in this respect are performed by the Second Assistant Postmaster General, and the services performed must be in accordance with postal laws and regulations.

One is an independent contractor when he may perform the services and do the work contracted for as befits him, or suits his purpose, or convenience, and to whom the master only looks for results. This is the very antithesis of the postal contract in issue since the appellants are always within the jurisdiction and under the direction, control and supervision of the Post Office Department as to routes, methods, schedules, time and every phase of the operation, and in so engaging appellants are functionaries of the United States Government. See *Fleming* v. *Commonwealth,* 191 Va. 288. See also *Aetna Ins. Co.* v. *Ill. Central R. Co.,* 6 N. E. (2d) 189, 365 Ill. 303, reversing 283 Ill. App. 527, Certiorari granted, 57 S. Ct. 939, 301 U. S. 679, 91 L. Ed. 1338. Certiorari dismissed, 58 Sup. Ct. 269, 302 U. S. 652, 82 L. Ed. 505.

The Supreme Court of Appeals of Virginia was misled by *Alward* v. *Johnson, supra,* in which it confused a property tax with a gross income tax upon operations. Having reached the wrong premise it ended with the wrong conclusion.

(h) A copy of the opinion of the Supreme Court of Appeals of Virginia is appended as Appendix A.

A copy of the opinion of the State Corporation Commission is appended as Appendix B.

(i) A copy of the judgments of the Supreme Court of Appeals of Virginia is appended as Appendix C.

It is respectfully submitted that Section 58-638 of the Code of Virginia is in contravention of Article I, Section 8, Clauses 3 and 7 of the Constitution, in that it provides for a tax which is essentially one on the privilege of operating motor vehicles over the highways of Virginia in performance of a Federal Governmental function; that it is in its essence a tax upon gross receipts from the carriage of United States mail, both intrastate and interstate, and therefore burdensome, and a tax upon the agreement itself between appellants and the Postmaster General. We believe that the question presented by the appeal is substantial, of serious public importance and fully justifies a review by the Supreme Court of the United States.

Respectfully submitted,

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APPENDIX A

Present: Hudgins, C. J., Eggleston, Spratley, Buchanan, Miller and Smith, JJ.

Record No. 4380.

CHARLES T. CROWDER

v.

COMMONWEALTH OF VIRGINIA, EX REL. STATE CORPORATION COMMISSION

Record No. 4381.

GEORGE H. ELLIS

v.

COMMONWEALTH OF VIRGINIA, EX REL. STATE CORPORATION COMMISSION

OPINION BY JUSTICE C. VERNON SPRATLEY, Richmond, Va., June 13, 1955.

FROM THE STATE CORPORATION COMMISSION

These cases, here on appeals from the State Corporation Commission of Virginia, as a matter of right, present the question whether the gross receipts road tax provided under § 58-638,* Code of Virginia, 1950, may be imposed on ap-

* § 58-638. "Except as hereinafter otherwise provided, every person who operates, or causes to be operated on any highway in this State, any motor vehicle, trailer or semi-trailer for the transportation of property for compensation, whether for rent, or for hire, or as a contract carrier, or as a common carrier, and every common carrier by motor vehicle, trailer or semi-trailer of pas-

pellants who operate motor vehicles on the highways of Virginia for the transportation of United States mail for compensation.

It was agreed before the State Corporation Commission that the cases be heard together and that a decision on one would be determinative of the other. The record contains the evidence and exhibits relating to the operations of Charles T. Crowder. The facts are not in dispute.

The appellant, Crowder, a resident of Virginia, operates ten motor vehicles over the highways of Virginia exclusively in the transportation of United States mail for com-

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sengers, shall pay quarterly to the State Treasurer, on or before the fifteenth day of April, July, October and January of each year, in addition to any other fees and taxes imposed by law upon motor vehicles, trailers and semi-trailers, and upon the operation thereof, and in addition to any motor fuel tax paid or payable by such person, a road tax calculated on the gross receipts derived from such operations during the quarter year ending with the preceding month, according to the following schedule:

"(1) Two percentum of the gross receipts derived by such person from all intrastate operation; and

"(2) Two percentum of such proportion of the gross receipts derived by such person from all interstate operations as the total number of miles traveled in interstate operations by the vehicles of such person on the public highways of this State bears to the total number of miles traveled in interstate operations by the vehicles of such person both within and without this State, including miles traveled on streets in cities and towns embraced within the highway system of this State, but exclusive in each case of the miles traveled in this State on any street maintained exclusively by any city or town.

"All taxes so collected shall be credited to the highway maintenance and construction fund.

"The provisions of this section shall apply for the tax year beginning January first, Nineteen hundred forty-nine, and annually thereafter until otherwise provided by law."

pensation, from and to points in Virginia and North Carolina. He owns the motor vehicles and selects and employs their drivers. He fixes the wages and hours of his employees, prescribes their duties, and controls their time of employment. He purchases the necessary fuel, lubricants and license tags for his vehicles. Neither he nor any of his employees are covered by the United States Civil Service, or Retirement System. He performs his duties under written contracts with the United States, which provide compensation in an annual sum, payable monthly. The routes to be traveled, the schedules to be followed, and the terminii to be served are specifically set out. Provisions for cancellation, renegotiation, and for extra compensation, should any service in addition to that specified be necessary, are prescribed. Neither of the appellants holds a certificate of necessity and convenience as a common carrier.

The appellants contend that since under the provisions of the U. S. Constitution (Article I, Section 8), Congress has assumed exclusive jurisdiction over post roads and post routes and has provided for carrying the mail (U. S. C. A., Title 39, Chapter 14), the transportation of mail is exclusively a Federal Government function, and cannot be burdened with taxation by the several States. Consequently, they claim that since they are engaged solely in the carriage of mail upon terms and conditions fixed by the Postmaster General of the United States, they are engaged in a purely governmental function, and, therefore, not subject to the imposition of the tax. They argued before the Commission, as they do here, that the burden of a gross receipts road tax levied on their gross receipts falls, in fact, on the Federal Government. In support of their contentions, they invoke certain decisions in the field of interstate commerce, where taxes upon such commerce have been held to be an unconstitutional burden.

The State Corporation Commission assessed Crowder with gross receipts road taxes in the sum of $3,200.70 for the period beginning January 1, 1951, through December 31, 1953, including penalty and interest to January 22, 1954. It assessed George H. Ellis with similar taxes in the sum of $1,214.45 for the same period, including penalty and interest.

Appellants do not question the amount of the taxes assessed, if their operations be subject to the taxes.

A review of the decisions of the Supreme Court discloses that "the trend of its decisions is not to extend governmental immunity from state taxation and regulations beyond the National Government itself and governmental functions performed by its officers and agents." *Penn Dairies* v. *Milk Control Com.*, 318 U. S. 261, 270, 87 L. Ed. 748, 63 S. Ct. 617.

The question here involved is similar to that before the Supreme Court of the United States in *Alward* v. *Johnson*, 282 U. S. 509, 75 L. Ed. 496, 51 S. Ct. 273, 75 A. L. R. 9. There the plaintiff was engaged in operating an automotive stage line between two points in California, and carried the mail by motor vehicles under a contract with the Post Office Department. Two-thirds of his gross receipts, upon the whole of which he was taxed, were derived from carrying the mails, the remainder from transporting passengers and freight. In upholding the right of California to collect a 5% gross receipts tax levied and collected exclusively for highway purposes, the Court said:

"Nor do we think petitioner's property was entitled to exemption from state taxation because used in connection with the transportation of the mails. There was no tax upon

the contract for such carriage; the burden laid upon the property employed affected operations of the Federal Government only remotely. *Union P. R. Co.* v. *Peniston,* 18 Wall 5, 30, 21, L. Ed. 787, 791; *Metcalf* v. *Mitchell,* 269 U. S. 514, 70 L. Ed. 384, 46 S. Ct. 172. The facts in *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218, 72 L. Ed. 857, 56 A. L. R. 583, 48 S. Ct. 451, and *New Jersey Bell Teleph. Co.* v. *State Bd. of Taxes & Assessments,* 280 U. S. 338, 74 L. Ed. 463, 50 S. Ct. 111, were held to establish direct interference with or burden upon the exercise of a Federal right. The principles there applied are not controlling here." (282 U. S. at 514, 75 L. Ed. at 499).

While in that case the carrier transported passengers and freight, as well as mail, and here the carriers transport mail exclusively, there can be no difference in legal principle because of the difference in the subjects of transportation, or in the proportion of the receipts derived therefrom. Immunity from taxation is not based upon the character of the subject transported or upon the apportionment of a taxpayer's income.

It will be noted that the Court distinguished the case of *Panhandle Oil Co.* v. *Mississippi, supra,* relied upon by appellants, in which it had been held that the State could not levy any excise tax on gasoline sold to the United States.

In *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 82 L. Ed. 155, 58 S. Ct. 208, the Court held that West Virginia could levy an occupation tax upon the gross receipts paid by the United States to a building contractor on work performed within the limits of that State. The court there said:

"The tax is not laid upon the Government, its property or officers.

* * *

"The tax is not laid upon any instrumentality of the Government. * * * Respondent is an independent contractor. The tax is non-discriminatory. (302 U. S. at 149).

* * *

"Respondent has no constitutional right to immunity from non-discriminatory local taxation and the mere fact that the tax in question burdens respondent is no defense. The defense is that the tax burdens the Government and respondent's right is at best a derivative one. He asserts an immunity which, if it exists, pertains to the Government and which the Government disclaims.

* * *

"In *Alward* v. *Johnson,* 282 U. S. 509, 75 L. Ed. 496, 51 S. Ct. 273, 75 A. L. R. 9, *supra,* as already noted, the tax was upon gross receipts and these were derived from a contract for carrying the mails, but the tax was upheld. If there appeared that the tax was in lieu of taxes upon the property and had been treated by the State Court as a property tax. But if the tax as actually laid upon the gross receipts placed a direct burden upon the Federal Government so as to interfere with the performance of its functions, it could not be saved because it was in lieu of a tax upon property or was so characterized." (302 U. S. at 158, 82 L. Ed. at 171).

Referring to the facts of the case under review, this was said:

"But if it be assumed that the gross receipts tax may increase the cost to the Government, that fact would not invalidate the tax. With respect to that effect, a tax on the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract. Concededly, such a tax

may validly be laid. * * * The fact that the tax on the gross receipts of the contractor in the *Alward case, supra,* might have increased the cost to the Government of the carriage of the mails did not impress the Court as militating against its validity." (302 U. S. at page 160).

The *Panhandle case, supra,* was overruled rather than distinguished in the later case of *Alabama* v. *King and Boozer,* 314 U. S. 1, 86 L. Ed. 3, 62 S. Ct. 43, where the State was allowed to collect a sales tax on building material sold to contractors constructing an Army camp for the United States under a "cost-plus fixed-fee" contract. In that case Mr. Chief Justice Stone said:

"The Government, rightly, we think, disclaims any contention that the Constitution, unaided by Congressional legislation, prohibits a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co.* v. *State ex rel. Knox, supra; Graves* v. *Texas Co., supra,* we think it no longer tenable. (314 U. S. at 8, 9, 86 L. Ed. at 6). (Citing cases).

* * *

"The added circumstances that they were bound by their

contract to furnish the purchased material to the Government and entitled to be reimbursed by it for the cost, including the tax, no more results in an infringement of the Government immunity than did the tax laid upon the contractor's gross receipts from the Government in *James* v. *Dravo Contracting Co.*" (314 U. S. at 14, 86 L. Ed. at 9).

Cf. *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 82 L. Ed. 907, 58 S. Ct. 623; *Sollitt* v. *Com.*, 161 Va. 854, 172 S. E. 290.

In *Oklahoma Tax Commission* v. *Texas Co.*, 336 U. S. 342, 93 L. Ed. 721, 69 S. Ct. 561, the State of Oklahoma was allowed to collect a tax on the gross value of production and an excise tax on each barrel of petroleum produced from lessees of Federal held Indian lands. In that case the Court reviewed its holdings over many years relative to the limit of governmental immunity, and overruled five of its earlier decisions. In support of its conclusion, the Court said:

"Equally significant was *Alward* v. *Johnson*, 282 U. S. 509, 514, 75 L. Ed. 496, 51 S. Ct. 273, 75 A. L. R. 9, which sustained a state tax measured by gross receipts on the property of a stage line engaged in carrying the mails." (336 U. S. at page 359).

Appellants refer to and cite *Railway Express Agency* v. *Commonwealth of Virginia*, 347 U. S. 359, 98 L. Ed. 757, 74 S. Ct. 558. That case is not in point here. It involves the imposition of a privilege tax under Code, § 58-546 and § 58-547; whereas the tax imposed under Code, § 58-638 is a tax levied on carriers of property for use of the public highways of the State.

Appellants also cite and rely upon a number of decisions from other courts which tend to support their contention. Those decisions, however, represent views which have been distinguished, modified or reversed by later cases. Our views are in harmony with the later decisions of the Supreme Court, as we understand them.

The tax imposed under Code, § 58-638 is a road use tax. It is not levied on the entire gross receipts of the interstate carrier; but only upon that percentage of its gross receipts that the number of miles operated over Virginia highways bears to the total number of miles traveled in interstate operations. It is collected and credited to the Highway Maintenance and Construction Fund, and its validity as a tax imposed for the use of State highways by an interstate carrier is now well settled. *Clark* v. *Poor*, 274 U. S. 554, 71 L. Ed. 1199, 47 S. Ct. 702; *Aero Mayflower Transit Co.* v. *Board of R. R. Commrs.*, 332 U. S. 495, 92 L. Ed. 99, 68 S. Ct. 167; *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 94 L. Ed. 1053, 70 S. Ct. 806; *Bode* v. *Barrett*, 344 U. S. 583, 97 L. Ed. 567, 73 S. Ct. 468; *The Adley Express Co.* v. *Commonwealth of Virginia*, 196 Va. 1007, 86 S. E. 2d 818.

Under the language of the Act, the tax applies to "every person who operates, or causes to be operated, on any highway in this State, any motor vehicle, trailer or semi-trailer for the transportation of property for compensation, whether for rent or hire, or as a contract carrier, or as a common carrier, * * *." This language needs no interpretation.

The appellants carry the mail under written contracts between them and the Postmaster General of the United States, acting under the authority and conditions imposed by

Congress (U. S. C. A., Title 39, Chapter 12). They are not officers or employees of the Federal Government or of any of its departments. They are independent contractors doing certain prescribed work for the Government at fixed compensation. As such the usual rules governing the construction of contracts applies to contracts for carrying the mails. 41 Am. Jur., Post Office, § 78, page 753; 72 C. J. S., Post Office, § 27e, page 302.

The terms and conditions of the contracts are merely specifications indicative of the service to be performed and not of the character of the agency by which they are performed.

However extensively the Government may have reserved the right to specify and control the actions of the contractors in carrying the mail, neither the reservation or exercise of that power gave to the contractors the status of a representative or agent of the Government. They were and are merely obligated to do certain specified work at a fixed compensation, and enjoy no official capacity.

For the foregoing reasons, the final order of the State Corporation Commission in each of the cases is affirmed.

Affirmed.

APPENDIX B

Case No. 12023.

RULE

It appearing that the defendant has failed to pay Gross Receipts Road Taxes indicated due in the amount of $3,-200.70, for the period January 1, 1951, through December 31, 1953, including penalty and interest to January 22, 1954, as imposed by Section 58-638 of the Code, it is

ORDERED that the defendant appear at 10:00 o'clock, a.m., on May 10, 1954, in the courtroom of the State Corporation Commission in the State Office Building in Richmond, Virginia, and show cause, if any can be shown, why he should not be fined and why his rights to operate over the highways of Virginia should not be suspended or revoked under Section 58-642 of the Code.

The rule shall be served on the defendant and a copy sent to the Division of Motor Carrier Taxation.

A True Copy
Teste:

N. W. ATKINSON, Clerk of the
State Corporation Commission.

* * *

Case No. 12024.

RULE

It appearing that the defendant has failed to pay Gross Receipts Road Taxes indicated due in the amount of $1,-214.45 for the period January 1, 1951, through December

31, 1953, including penalty and interest to January 23, 1954, as imposed by Section 58-638 of the Code, it is

ORDERED that the defendant appear at 10:00 o'clock a.m., on May 10, 1954, in the courtroom of the State Corporation Commission in the State Office Building in Richmond, Virginia, and show cause, if any can be shown, why he should not be fined and why his rights to operate over the highways of Virginia should not be suspended or revoked under Section 58-642 of the Code.

The rule shall be served on the defendant and a copy sent to the Division of Motor Carrier Taxation.

A True Copy
Teste:

N. W. ATKINSON, Clerk of the
State Corporation Commission.

* * *

In Re: Rule for Non-Payment of Gross Receipts Taxes.

Present: Commissioners Ralph T. Catterall (Chairman), W. Marshall King. (Chairman Catterall Presiding.)

Appearances: Thomas L. Woodward and Frank A. S. Wright, Counsel for Charles T. Crowder.

Frederick T. Gray, Assistant Attorney General, Commonwealth of Virginia.

W. C. Seibert, Commerce Counsel for the Commission.

Date of Hearing, May 10, 1954.

Mr. Seibert: May it please the Commission, this is a Rule against Charles T. Crowder, of Suffolk, Virginia, alleging failure to pay Gross Receipts Road Taxes in the amount of $3,200.70, covering the period January 1, 1951, through December 31, 1953, including penalty and interest to January 22, 1954.

Service was made upon Mr. Crowder by Deputy Sheriff of the County of Nansemond, Virginia, on the 13th day of March, 1954.

Mr. Stuart, will you take the stand, please.

ALBERT STUART, JR.,
a witness introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Seibert:

Q. Will you give your name and position with the Commission, please?

A. Albert Stuart, Assistant Director, Division of Motor Carrier Taxation.

Q. Are you charged with the duty to see that all carriers who operate for compensation over the highways of the State of Virginia pay Gross Receipts Taxes, file their reports and pay taxes?

A. Yes, sir.

Q. Do you have investigations made of the operations of these carriers from time to time?

A. I do, sir.

Q. Did you have an investigation made of the opera-

tions of Mr. Charles T. Crowder, of Suffolk, Virginia?

A. Yes, sir.

Q. Will you explain when that investigation of his accounts was made and what was the result of the investigation?

A. Mr. Julian H. Osborne, one of the field representatives of the Department of Motor Carrier Taxation, made an audit of the accounts on January 13, 1952, and ascertained the amount of taxes due.

Mr. Woodward: We object to that unless he is here.

Mr. Seibert: Are you in charge of that office?

A. Yes.

Q. Is Mr. Osborne under your direct supervision?

A. Yes.

Q. Did he make that audit under your supervision?

A. Yes.

Q. And following your authority and direction?

A. Yes, sir.

Mr. Seibert: In view of the objection of Mr. Woodward, I would like to state that this audit was made by one of the members of the staff under the direction of Mr. Stuart.

Mr. Woodward: We object to it. We have the right to cross examine the man who made the audit.

Chairman Catterall: Do you claim that the audit is erroneous?

Mr. Woodward: I don't claim either way, but I claim that we are entitled to cross examine the one who made it.

Chairman Catterall: I am somewhat taken by surprise, Mr. Woodward, because Mr. Crowder was in and talked to Judge Hooker and me and made no objection to the

amount of the audit but only as to the legal grounds.

Mr. Woodward: Maybe we can agree on it.

Mr. Seibert: We can have Mr. Osborne here.

Chairman Catteral: Is he in town?

Mr. Seibert: Yes.

Mr. Woodward: Suppose we admit the Exhibit, subject to a later cross examination.

Chairman Catterall: Will someone get Mr. Osborne over here and this will be filed as Exhibit I subject to check.

Mr. Seibert:

Q. What date was this audit made?
A. Made on February 2, 1954.

Q. Are you sure of that?
A. No, January 13, 1954.

Q. January 13, 1954, the audit was made by Mr. Julian H. Osborne?
A. Yes.

Q. What does that audit show is due by Mr. Crowder in Gross Receipts Road Taxes?
A. $3,200.70, including penalty and interest.

Q. How much of it was in tax?
A. $2,902.66.

Q. For what period was the audit made and for what period were the taxes due?
A. January 1, 1951 to December 31, 1953.

Q. What does this audit reflect was the reason for the tax?
A. The carrier failed to file reports and pay any taxes during the period.

Q. What sort of operation is Mr. Crowder engaged in?
A. It appears in the audit that he is engaged in the transportation of United States mail.

Q. Do you know how that mail is being transported?
A. No, sir.
Mr. Woodward: We concede that it is being transported by motor vehicle.

Mr. Seibert:

Q. Is he employed directly by the United States Government or is he employed under contract?

Mr. Woodward: We concede that he is employed by contract.

Mr. Seibert:

Q. Do you know how much of an operation Mr. Crowder has?
A. No, except from the audit by his gross receipts.

Q. You don't know how many pieces of equipment he has?
A. No.

Mr. Woodward: We concede that he is operating ten motor vehicles in the carriage of United States mail exclusively.

Mr. Seibert:

Q. Has Mr. Crowder filed his reports at any time?
A. No, sir.

Q. Was he informed of the requirements?
A. Apparently he was not.

Q. Was the audit the first time he was checked as to operation?
A. It was.

Q. Was he sent a questionnaire?
A. Not prior to the date of the audit.

Q. Is Mr. Crowder a common carrier, do you know?

Mr. Woodward: That is a legal question.

Mr. Seibert: It is not a legal question. He holds a certificate from the Commission.

Mr. Woodward: What is a common carrier and what a contract carrier is a legal question.

Mr. Seibert:

Q. Does Mr. Crowder hold a certificate of public convenience and necessity as a common carrier from the State Corporation Commission?

Mr. Woodward: We object to the question and any answer.

Chairman Catterall: Ask the question, Does he hold a certificate of public convenience and necessity issued by the Commission.

Mr. Woodward: We concede he does not.

Mr. Seibert:

Q. What type of equipment does he have, do you know?
A. No, sir.

Q. Was this audit the first information Mr. Crowder had regarding this bill for taxes?
A. So far as my file indicates, it is.

Q. When was that sent to him?
A. Apparently it was delivered to Mr. Crowder on February 4 when he appeared in conference with the Commission, at which time Mr. Osborne was present.

Q. He was informed February 4 from your statement?

A. Yes, sir.

Q. Did you handle after that in an effort to collect these taxes?

A. I have a memorandum from Mr. Osborne who was present at the conference with the Commission and Mr. Crowder in which he states:

"A conference was held and Mr. Crowder given an opportunity to pay the amount by March 5, 1954, and as of March 8, 1954, the amount had not been paid and I referred the matter to you for collection."

Q. And the Rule was issued March 10. Has any payment been made on it up to the present time?

Mr. Woodward: We concede that it has not.

A. No, sir.

Mr. Seibert: I believe that is all.

Chairman Catterall: After you delivered a copy of that audit, Exhibit I, did he tell you or write you that the amounts shown by the audit were erroneous?

A. No, sir.

Chairman Catterall: You may cross examine.

CROSS EXAMINATION.

By Mr. Woodward:

Q. What is your official position?

A. Assistant Director of the Division of Motor Carrier Taxation.

Q. Do you contend that Mr. Crowder carries anything but United States mail?

A. There is no information that has come to my atten-

tion that he does.

Q. Your contention is that he is amendable to taxation in the State of Virginia on the carriage of United States mail exclusively?

A. In effect, yes, sir. Our contention is that he operates for compensation.

Mr. Seibert: That is all I have.

Chairman Catterall: You may stand aside.

Witness stood aside.

Mr. Woodward: I move to strike the evidence of the Commonwealth put in by the Department of Taxation on the grounds that this Commission is without jurisdiction in the premises for this reason:

That the carriage of United States mail is a governmental function and Mr. Crowder by carrying United States mail is an employee of the United States Government for stated compensation, that he is not a contract carrier and not a common carrier.

Chairman Catterall: What did you mean when you said he was employed under contract?

Mr. Woodward: That is a mere method of fixing his compensation. He is still a direct employee of the United States Government.

Chairman Catterall: Have you a copy of his contract?

Mr. Woodward: I will furnish that if the Commission overrules my motion at this time. There is no case where I can find, if there are they have escaped me, in which it has been held that any state can levy any tax on the carrying of United States mail or on any United States Governmental employee in its Governmental function. That is our

position and we believe that Mr. Crowder is not subject to taxation in his employment in carrying mail and that the Commission is without jurisdiction.

Chairman Catterall: Have you read that memorandum that I gave Mr. Wright last week?

Mr. Woodward: I am familiar with the Atwood case. The Atwood case deals with the stage line or truck line which carries other commodities which was done along with the carriage of mail and, therefore, because of the carriage of those commodities came under the purview of the Commission and to some extent it is scoffed at because it is not possible to tax the mail itself.

I do not have the citation with me but in one case it was held that to avoid the payment of taxes, all the employees had to do was to allocate certain vehicles to the carrying of United States mail.

Chairman Catterall: Is that a State case or Federal case?

Mr. Woodward: It is a State case. It is an Indiana case. I would be glad to furnish it to the Commission along with the memorandum, if you wish. It is a new case and the authorities are somewhat lean but in the case of Jersey Telephone Company v. Knox, it was held that there could be no tax levied against that part of the Telephone Company that was allocated to the United States Government, and in another case it was held that you could not tax gasoline that was used by the United States Government, and I find no case where this Commission can levy taxes against vehicles that carry United States mail, and I offer for the record the contract that Mr. Crowder has with the Government.

Chairman Catterall: You wish to file that as Exhibit 2?

Mr. Woodward: Yes, sir.

Mr. Seibert: Is it conceded that Mr. Crowder has Virginia license plates and has secured from the Commission any exemption plates or classification plates?

Mr. Woodward: We have no exemption plates and none applied for.

Mr. Seibert: Do you have any Virginia license plates?

Mr. Woodward: Yes, and we pay taxes on all gasoline.

Mr. Seibert: And he purchases license plates from the Division of Motor Vehicles?

Chairman Catterall: We had better develop the evidence further and the Commission will overrule your motion. Mr. Osborne is here if you want him for cross examination.

Mr. Woodward: We think we can dispense with that. We will call Mr. Crowder.

CHARLES T. CROWDER,

a witness introduced in his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Woodward:

Q. You are Mr. Charles T. Crowder residing in the City of Suffolk?

A. Yes, sir.

Q. Do you hold certain contracts with the United States Government for the carriage of United States mail?

A. Yes, sir.

Q. Over what routes do you operate?

A. Suffolk to Danville; Norfolk to Petersburg; Norfolk to Rocky Mount (twice); and Norfolk to Muden.

Q. I hand you certain memorandum or letters dated June 22, 1953 and signed by Mr. J. C. Allen, Assistant Postmaster General, on the stationery of the Post Office Department, and ask you whether or not this is an allocation of route numbers and termini of the routes you now operate and have operated for sometime past with United States Government, the Post Office Department?

Mr. Gray: Will you read the question, please.

Note: Question read as follows:

"Q. I hand you certain memorandum or letters dated June 22, 1953, and signed by Mr. J. C. Allen, Assistant Postmaster General, on the stationery of the Post Office Department, and ask you whether or not this is an allocation of route numbers and termini of the routes you now operate and have operated for sometime past with the United States Government, the Post Office Department"?

Mr. Woodward: If you would let me read it into the record, I will be glad to do so.

Mr. Gray: I think it should be filed.

Mr. Woodward: We will file all of these. There are five that deal with the routes as follows:

No. 14549, Part A: Danville to Suffolk; Part B: Danville to Boydton; Part C: Danville to Emporia; Part D: Emporia to Suffolk.

Route No. and Termini:

14586, Norfolk to Munden, Virginia.

Route No. and Termini:

14585, Norfolk to North Petersburg Railroad Station (Atlantic Coast Line) Virginia.

Route No. and Ternini:

18537, Norfolk to Rocky Mount Railroad Station.

Route No. and Termini:

18102, Norfolk, Virginia to Rocky Mount Railroad Station and I would like to offer these.

Chairman Catterall: They are received as Exhibit No. 2.

Mr. Woodward:

Q. You operate ten motor vehicles exclusively in the carriage of United States mail?

A. Yes.

Q. From whom do you receive your pay?

A. United States Government, Postmaster General.

Q. I notice on two of the letters that they refer to "Rocky Mount", but not the state. Is that Rocky Mount, North Carolina?

A. Yes, sir.

Q. On these vehicles do you carry anything but United States mail?

A. No, sir.

Q. How long have you been engaged in this business?

A. I can hardly recall, about thirty years, I imagine. It has been a long time.

Q. Have you ever been called upon by the State of Virginia to pay any taxes or file any reports until the time you were asked about it in January?

A. No, sir, never heard anything about it.

Q. Have you any regular schedule in your operation?

A. Yes, sir, I have to have one.

Q. And do you have definite routes?

A. Yes, sir.

Q. Who fixes the routes and schedules?

A. That is fixed out of Washington, the Postmaster General.

Q. And you have to comply with what they say in order to hold your contracts?

A. Yes, sir.

Q. Where do you buy your gasoline?

A. Different places.

Q. Do you pay the regular gasoline tax to the Motor Vehicle Department?

A. Yes, sir.

CROSS EXAMINATION

By Mr. Gray:

Q. I would like for you to look at Exhibit 2, your authority by which you operate, and tell us whether all of those bear the same date?

A. These three all have the same date.

Q. They are the ones for Virginia routes?

A. Yes.

Q. And these two are North Carolina routes?

A. The first three are the Virginia routes and the second two are the North Carolina routes, and I believe the dates are different on those two. One runs out ahead of the other.

Q. How many vehicles are involved?

A. Ten.

Q. Obviously, you don't operate all of them yourself?

A. No, I have drivers.

Q. Who pays the drivers?

A. I pay them.

Q. You fix their salaries?
A. Yes, sir.

Q. Are they covered by Federal Social Security?
A. Yes, sir.

Q. Do you haul anything else other than mail?
A. No, sir.

Q. Do you carry newspapers also?
A. I carry newspapers in the mail.

Q. Just those that are mailed?
A. That is right.

Q. Do you have complete control over your employees, do you hire them and fire them yourself?
A. Yes.

Q. I understand that your counsel has answered for you that you do have Virginia classification plates on your cars?
A. Oh, yes.

Q. And you made application to the State Corporation Commission for these plates?
A. No, sir, some inspector came down and said we had to put them on, and I told him that I didn't know why, that I had never had to do that as I only carry the mail and have never had to buy them and he said, "You are going to buy them today", and I said, "If I am going to buy them, I'm going to", and he said, "Fill out the papers".

Q. Do you get copies of your contracts with the Federal Government?
A. What do you mean?

Q. These letters state that the contract has not been renewed but will be renewed?
A. Yes.

Q. Do you have a copy of the contract?
A. No, that is in Washington.

Chairman Catterall: Don't they give you a copy?

A. No, sir.

Q. How do you know what you do?
A. I get schedules.

Mr. Gray:

Q. How do you get these contracts, on bids?
A. No, they used to do it on bids but now they bargain with us.

Q. What do you mean by "bargain"?
A. They know whether or not I have given good service and so they ask me if I want it again.

Q. What is the basis of the mileage? Is the pay on mileage basis?
A. We figure it different ways.

Q. How do you arrive at what you get out of it?
A. When I first bid on it, it was a certain bid and later on they renewed them, and you send in your application and get an increase if you can, and sometimes they will give you an increase and sometimes they won't.

Q. Take one contract, do you get a flat fee for the year?
A. So much per year per month.

Q. For the use of your vehicles?
A. Yes, sir, I suppose so, that is it.

Q. You have to pay your own help, provide your own cars and your own insurance?
A. Yes.

Q. Are you covered by Federal Civil Service?
A. No, sir.

Q. And you don't have Federal Retirement?
A. No, sir, not that I know of.

Q. These contracts run for four years?
A. Yes, and are renewable, four years and renewable. We used to have to bid on them.

Q. You have to bid after four years?
A. No, you don't have to bid on them now.

Q. At the termination of the four years the Government can cancel the contract and take it away from you?
A. They can take it at any time.

Q. And you don't have any Federal retirement?
A. They pay your month's salary.

Witness stood aside.

Mr. Woodward: I would like to renew my motion and argue it at this time.

Chairman Catterall: Do you want to argue it or file a brief?

Mr. Woodward: I think it would be more satisfactory to the Commission to file a brief.

Chairman Catterall: When would you like to file the brief?

Mr. Woodward: I would like to have as much as three weeks.

Chairman Catterall: Do you want to file a brief and then argue it or argue it and then file a brief?

Mr. Woodward: I will submit a brief and argue it now or after the brief is filed.

Chairman Catterall: Do you want us to set a date for argument and have the brief filed before that date?

Mr. Woodward: Either way that suits the Commission. I would rather file the brief and then set a date to argue it.

Chairman Catterall: Suppose you file your brief on the first day of June and then we'll have to get the black book to see about the date for argument.

Mr. Woodward: Might we agree that Mr. Ellis' case falls within the same category and should be decided in accordance with the decision in this case.

Chairman Catterall: Yes.

Mr. Seibert: I wonder if counsel will agree that I file proof of service as well as the audit and that the correct amount is $1,214.45, and all facts relating thereto are in accordance with this matter.

Mr. Woodward: We concede that the computation is correct on the taxes. Whether the application of the penalty and interest are proper, we can argue it with the Commission later.

Chairman Catterall: Then briefs will be filed on the first of June.

Mr. Gray: I think it would be most helpful to all parties if we could get a copy of the contract.

Mr. Woodward: If I can get a copy, I will be glad to file it.

Chairman Catterall: I think it would be helpful, and we will reserve Exhibit 3, and after you get it, if you will mail it in, we will appreciate it. Can you get that in within a week?

Mr. Woodward: I don't think so. We have to write and then it has to go through several Postmasters and the Postmaster General and so on.

Chairman Catterall: We seem to have June 1st as an open date. If you can get your briefs in by May 29th, we could have it argued on June 1st.

Mr. Woodward: How about the Commonwealth's brief. We would like for them to have their brief in before we argue it.

Chairman Catterall: You don't want simultaneous briefs?

Mr. Woodward: I think it would be more helpful if they filed their brief.

Chairman Catterall: Suppose the Commonwealth files its brief on the 17th of May, if you want him to file it first. The Commonwealth will file on the 17th of May and the Defendant on the 29th of May, and the case will be set down for argument on June 1st, Tuesday, at 10:00 a.m.

* * *

In Re: Rule for Non-Payment of Gross Receipts Road Taxes.

Present: Commissioners, Ralph T. Catterall (Chairman), W. Marshall King, (Chairman Catterall Presiding).

Appearances: Thomas L. Woodward and Frank A. S. Wright, Counsel for George H. Ellis.

Frederick T. Gray, Assistant Attorney General, Commonwealth of Virginia.

W. C. Seibert, Commerce Counsel for the Commission.

Date of Hearing May 10, 1954.

Note: The following agreement was had in regard to this case during the hearing of the case of Mr. Charles T. Crowder:

"Mr. Woodward: Might we agree that Mr. Ellis' case falls within the same category and should be decided in accordance with the decision in this case.

"Chairman Catterall: Yes.

"Mr. Seibert: I wonder if counsel will agree that I file proof of service as well as the audit and that the correct amount is $1,214.45, and all facts relating thereto are in accordance with this matter.

"Mr. Woodward: We concede that the computation is correct on the taxes. Whether the application of the penalty and interest are proper, we can argue it with the Commission later."

Chairman Catterall: Exhibit I will be filed in evidence.

* * *

On May 10, 1954, came on for hearing the rule of the Commission awarded against Charles T. Crowder for failure to pay gross receipts road taxes, Chairman Catterall and Commissioner King sitting, with Commissioner Hooker present at the argument.

Appearances were as follows:

Thomas L. Woodward and Frank A. S. Wright for the defendant. Frederick T. Gray for the Commonwealth and William C. Seibert for the Commission.

The Commission is of the opinion that the defendant is subject to the payment of gross receipts road taxes, and it is,

ORDERED:

1. That Charles T. Crowder be, and he hereby is, fined the sum of $250.00 and costs unless on or before September 3, 1954 he pays gross receipts road taxes in the amount of

$3,200.70 for the period from January 1, 1951, through December 31, 1953, including penalty and interest to January 22, 1954.

2. A copy of this order shall be sent to all counsel and a copy sent to the Division of Motor Carrier Taxation.

A True Copy,
Teste:

N. W. ATKINSON, Clerk of the
State Corporation Commission.

* * *

On May 10, 1954, came on for hearing the rule of the Commission awarded against George H. Ellis for failure to pay gross receipts road taxes, Chairman Catterall and Commissioner King sitting, with Commissioner Hooker present at the argument.

Appearances were as follows:

Thomas L. Woodward and Frank A. S. Wright appeared as counsel for the defendant. Frederick T. Gray appeared for the Commonwealth and William C. Seibert appeared for the Commission.

The Commission is of the opinion that the defendant is subject to the payment of gross receipts road taxes and it is,

ORDERED:

1. That George H. Ellis be, and he is hereby, fined the sum of $250.00 and costs unless on or before September 3, 1954, he pays gross receipts road taxes in the amount of $1,214.45 for the period from January 1, 1951, through December 31, 1953, including penalty and interest to January 23, 1954.

2. A copy of this order shall be sent to all counsel and a copy sent to the Division of Motor Carrier Taxation.

A True Copy,
Teste:

N. W. ATKINSON, Clerk of the
State Corporation Commission.

* * *

Opinion, CATTERALL, Commissioner:

These two cases raise the same question of law and were heard on a single record.

The question is whether a contract carrier of mail is liable for the gross receipts road tax imposed by § 58-638 of the Code on every person who operates on any highway in this State any motor vehicle for the transportation of property for compensation.

These taxpayers do so operate, and they claim immunity from the tax solely on the ground that they are performing a governmental function.

There is not a word in the Constitution of the United States dealing with this question. In the early days of the Republic, when states felt strongly about states' rights, some of them tried to tax out of existence the Bank of the United States. To meet the challenge, Chief Justice Marshall pronounced the doctrine of implied federal immunity from State taxation in *McCulloch* v. *Maryland*, 4 Wheaton, 316, and the limits of that doctrine have been the subject of debate ever since. The reason there is so much room for argument is that the doctrine is not based on the language of the fundamental law but on what the Supreme Court Justices, or a majority of them, think is good policy. For many years they thought it was good policy to forbid the

central government to tax the salaries of state officials and to forbid the state governments to tax the salaries of federal officials.

Virginia's gross receipts road tax is a tax for using the highways. It is imposed on business men whose business is conducted on state property. It is what is called a third-structure tax. For many years all states have imposed gasoline taxes and license plate taxes on motor vehicles. In recent years some states have imposed various kinds of additional taxes for the use of the highways. There can be no constitutionally relevant difference between a gasoline tax, a license plate tax and a gross receipts road tax. A carrier of mail who did not have to pay any of those three taxes could enter a lower bid to the government for his contract to carry the mail. If he did not have to pay a state income tax on his net income earned from carrying the mail, he could make a lower bid. If he did not have to pay social security taxes on his employees, he could make a lower bid. His bid has to be high enough to cover all the expenses of doing the business. Crowder and Ellis do not claim immunity from any of the taxes paid by other motor vehicle carriers except the gross receipts road tax.

A contractor carrying the mail is not performing a governmental function any more than a contractor building a post office or a contractor furnishing munitions or food to the army.

Since 1903, the railroads of Virginia have paid a gross receipts tax on their transportation receipts including receipts derived from carrying the mail.

In *Alward* v. *Johnson,* 282 U. S. 509 (1931) the Supreme Court decided the question here involved, and held that California could collect a 5% gross receipts tax from motor vehicle carriers who carried mail. It happened that the

carrier in that case derived only two-thirds of his revenue from his contract to carry mail, and Crowder seeks to distinguish that case on the ground that there is a constitutional difference between two-thirds and three-thirds. On principle, there can be no difference between one case and the other. If payments received from the government are immune from state taxation, they are immune because they are payments from the government, and not because they constitute the taxpayers' entire income. The Alward case has been used by the Supreme Court in two later cases to uphold state excise taxes on the activities of government contractors.

In *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (1937), the state was allowed to collect a tax of $135,761.51 upon the gross amounts paid by the United States to a building contractor. At page 152, the court said:

"In *Alward* v. *Johnson*, 282 U. S. 509, 514, 75 L. (ed.) 496, 499, 51 S. Ct. 273, 75 A. L. R. 9, the Court sustained a state tax upon the gross receipts of an independent contractor carrying the mails. The taxpayer operated an automotive stage line. Two-thirds of his gross receipts, upon the whole of which he was taxed were derived from carriage of United States mails and the remainder from carriage of passengers and freight. The Court found that the property used in earning these receipts were devoted chiefly to carrying the mails and that without his contract with the Government the stage line could not be operated profitably. In upholding the tax upon his gross receipts we distinguished *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218 L. (ed.) 857, 48 S. Ct. 451, 56 A. L. R. 583, supra, saying: 'There was no tax upon the contract for such carriage; the burden laid upon the property employed affected operations of the Federal Government only remotely * * * The facts in *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, 72 L. (ed.)

857, 48 S. Ct. 451, A. L. R. 583, and *New Jersey Bell Telep. Co.* v. *State Bd. of Taxes and Assessments*, 280, U. S. 338, 74 L. (ed.) 463, 50 S. Ct. 111, were held to establish direct interference with or burden upon the exercise of a Federal right. The principles there applied are not controlling here.'"

And at page 160:

"But if it be assumed that the gross receipts tax may increase the cost to the Government, that fact would not invalidate the tax. With respect to that effect, a tax on the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract."

* * *

"The fact that the tax on the gross receipts of the contractor in the *Alward case*, 282 U. S. 509, 75 L. (ed.) 496, 51 S. Ct. 273, 75 A. L. R. 9 supra, might have increased the cost to the Government of the carriage of the mails did not impress the Court as militating against its validity."

In *Oklahoma Tax Commission* v. *Texas Company*, 336 U. S. 342 (1949), the court allowed the state to collect two taxes, a tax on the gross value of production and an excise tax on every barrel of petroleum produced, from lessees of Indian lands. In order to uphold these taxes the court had to overrule five of its earlier decisions.

As an authority for overruling those decisions, the court relied on the Alward case, saying (p. 359):

"Equally significant was *Alward* v. *Johnson*, 282 U. S. 509, 514, 75 L. (ed.) 496, 499, 51 S. Ct. 273, 75 A. L. R. 9, which sustained a state tax measured by gross receipts on the property of a stage line engaged in the carrying the mails."

In the Alward case, the court distinguished *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218 (1928), in which it had held that the state could not collect its gasoline tax on the sale of gasoline to the United States. The Panhandle Case was overruled rather than distinguished in *Alabama* v. *King & Boozer,* 314 U. S. 1 (1941), in which the state was allowed to collect a sales tax on lumber used to build an army camp by a contractor who furnished the lumber on a cost-plus basis.

In *Penn Dairies* v. *Milk Control Commission,* 318 U. S. 261 (1943) the court said (p. 269):

"We may assume also that, in the absence of congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. *Ohio* v. *Thomas,* 173 U. S. 276, 43 L. (ed.) 699, 19 S. Ct. 453; *Johnson* v. *Maryland,* 254 U. S. 51, 65 L. (ed.) 126, 41 S. Ct. 16; *Hunt* v. *United States,* 278 U. S. 96, 73 L. (ed.) 200, 49 S. Ct. 38; *Arizona* v. *California,* 283 U. S. 423, 75 L. (ed.) 1154, 51 S. Ct. 522. But those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions."

At page 270:

"The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents."

And at page 277 the court stated that it considered that the Panhandle Case had been overruled by *Alabama* v. *King & Boozer,* and in *Kern-Limerick, Inc.* v. *Scurlock,* 98 L. (ed.) (Advance p. 313) (1954), the dissenting Justices accused their brethren of overruling King & Boozer. Thus

the debate on intergovernmental immunity goes on and will continue to go on. But the area of controversy has moved a long way from the question with which we are concerned in the case at bar. There is no disagreement among the Supreme Court Justices, that a tax imposed on a government contractor (and not directly on the United States) is constitutional. The majority in Kern-Limerick said (p. 321):

"Thus, King & Boozer is not controlling for, though the Government also bore the economic burden of the state tax in that case, the legal incidence of that tax was held to fall on the independent contractor and not upon the United States."

And supported that statement of the law with the following footnote:

"See *Oklahoma Tax Com.* v. *Texas Co.*, 336 U. S. 342, 365, 93 L. (ed.) 721, 738, 69 S. Ct. 561: 'True intergovernmental immunity remains for the most part. But, so far as concerns private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption.'"

It is settled law that a government contractor is not immune from a state tax even if he passes on to the United States the exact burden of the tax pursuant to the provisions of a cost-plus contract. Crowder and Ellis do not do that, because they have lump-sum contracts and not cost-plus contracts. They are liable for the gross receipts road tax; and the constitutional point they have raised does not, at this late date, present a debatable question.

HOOKER AND KING, Commissioners, concur.

* * *

APPENDIX C

VIRGINIA,

IN THE SUPREME COURT OF APPEALS held at the Court Library Building, in the City of Richmond on Monday the 13th day of June, 1955.

Charles T. Crowder, Appellant,

against Record No. 4380

Commonwealth of Virginia, ex rel., State Corporation Commission, Appellee.

Upon an appeal of right from and supersedeas to an order of the State Corporation Commission entered on the 25th day of June, 1954.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the order complained of. It is therefore adjudged, ordered and decreed that the said order be, and the same is hereby, affirmed, and that the appellant pay to the appellee thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be certified to the said Corporation Commission.

Appellee's costs:

Attorney's fee	$50.00
Printing brief	36.80
Total	$86.80

A Copy,
Teste:

H. G. Turner, Clerk.

APPENDIX C

VIRGINIA,

IN THE SUPREME COURT OF APPEALS held at the Court Library Building, in the City of Richmond on Monday the 13th day of June, 1955.

George H. Ellis, Appellant,

against Record No. 4381

Commonwealth of Virginia, ex rel., State Corporation Commission, Appellee.

Upon an appeal of right from and supersedeas to an order of the State Corporation Commission entered on the 25th day of June, 1954.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the order complained of. It is therefore adjudged, ordered and decreed that the said order be, and the same is hereby, affirmed, and that the appellant pay to the appellee thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be certified to the said Corporation Commission.

Appellee's costs:

Attorney's fee	$50.00
Printing brief	36.80
Total	$86.80

A Copy,
Teste:

H. G. Turner, Clerk.

NOV 18 195

In the

Supreme Court of the United States

October Term, 1955

No. 494

CHARLES T. CROWDER,
Appellant

v.

COMMONWEALTH OF VIRGINIA, AT THE RELATION OF THE STATE CORPORATION COMMISSION,
Appellee

GEORGE H. ELLIS,
Appellant

v.

COMMONWEALTH OF VIRGINIA, AT THE RELATION OF THE STATE CORPORATION COMMISSION,
Appellee

Appeal from the Supreme Court of Appeals of Virginia

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

J. LINDSAY ALMOND, JR.
Attorney General of Virginia

C. F. HICKS
Assistant Attorney General of Virginia

Supreme Court – State Library Building
Richmond 19, Virginia

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In the

Supreme Court of the United States

October Term, 1955

No. 494

CHARLES T. CROWDER,

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Appellee

GEORGE H. ELLIS,

Appellant

v.

COMMONWEALTH OF VIRGINIA, AT THE RELATION OF THE STATE CORPORATION COMMISSION,

Appellee

Appeal from the Supreme Court of Appeals of Virginia

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellee, believing that the matters set forth herein will demonstrate the lack of substance in the question presented by this appeal, files this Statement in Opposition to the appellants' statement as to jurisdiction. The appellee

includes its motion to dismiss the appeal or affirm the order below on the ground that the federal questions raised on behalf of the appellants are so unsubstantial as to obviate further argument. The matters here relied upon are more particularly stated below.

I.

The State Statute Involved and the Nature of the Case

A.

THE STATUTE

The appellants contend that § 58-638 of the Code of Virginia as applied to them is repugnant to the Constitution of the United States. That section of the Code of Virginia reads as follows:

> "Except as hereinafter otherwise provided, every person who operates, or causes to be operated, on any highway in this State, any motor vehicle, trailer or semi-trailer for the transportation of property for compensation, whether for rent, or for hire, or as a contract carrier, or as a common carrier, and every common carrier by motor vehicle, trailer or semi-trailer of passengers, shall pay quarterly to the State Treasurer, on or before the fifteenth day of April, July, October and January of each year, in addition to any other fees and taxes imposed by law upon motor vehicles, trailers and semi-trailers, and upon the operation thereof, and in addition to any motor fuel tax paid or payable by such person, a road tax calculated on the gross receipts derived from such operations during the quarter year ending with the preceding month, according to the following schedule.
>
> "(1) Two percentum of the gross receipts derived by such person from all intrastate operation; and

"(2) Two percentum of such proportion of the gross receipts derived by such person from all interstate operations as the total number of miles traveled in interstate operations by the vehicles of such person on the public highways of this State bears to the total number of miles traveled in interstate operations by the vehicles of such person both within and without this State, including miles traveled on streets in cities and towns embraced within the highway system of this State, but exclusive in each case of the miles traveled in this State on any street maintained exclusively by any city or town.

"All taxes so collected shall be credited to the highway maintenance and construction fund.

"The provisions of this section shall apply for the tax year beginning January first, nineteen hundred forty-nine, and annually thereafter until otherwise provided by law."

B.

STATEMENT OF THE CASE AND THE PROCEEDINGS BELOW

1. The appellants, Charles T. Crowder and George H. Ellis, are contract carriers of the United States mail by motor vehicle over the highways of Virginia and North Carolina.

2. The appellants furnish and operate several motor vehicles over the highways of Virginia, which vehicles are used solely to transport the United States mail. The appellants employ drivers for these trucks, pay them and fire them. They purchase the trucks, fuel and lubricants and license tags for the vehicles. Neither the appellants nor any of their employees are covered by the Federal Civil Service System or the Federal Retirement System.

3. The appellants are under contract for an annual sum to transport the mail. The contracts contain cancellation provisions, renegotiation provisions, and provisions for extra consideration should any service in addition to that specified in the contract be necessary. (A copy of one set of the contracts may be found in the Appendix to this Statement.)

4. The State Corporation Commission of the Commonwealth of Virginia assessed Charles T. Crowder with Gross Receipts Road Taxes in the sum of $3,200.70 for the period beginning January 1, 1951 through December 31, 1953, including penalties and interest to January 22, 1954. George H. Ellis was assessed with Gross Receipts Road Taxes in the sum of $1,214.45 for the same period, including penalties and interest.

5. This assessment was upheld in a decision of the State Corporation Commission after a hearing of the matter before the Commission on May 10, 1954.

6. On the 17th day of November, 1954, the Supreme Court of Appeals of Virginia awarded the appellants an appeal as a matter of right and supersedeas. The case was heard by the said Court on April 19, 1955. On June 13, 1955, the Supreme Court of Appeals of Virginia affirmed the order of the State Corporation Commission.

C.

THE QUESTIONS PRESENTED

1. Does the imposing of Virginia's Gross Receipts Road Tax upon the appellants constitute an unconstitutional interference or burden upon the Federal government and its postal system?

2. Does Virginia's Gross Receipts Road Tax (§58-638 of the Code of Virginia) impose an unconstitutional burden upon interstate commerce?

II.

Argument

A.

THE LEVY OF A GROSS RECEIPTS ROAD TAX UPON A CONTRACT CARRIER OF THE MAIL DOES NOT VIOLATE THE CONSTITUTION OF THE UNITED STATES OR ANY ACT OF CONGRESS.

The appellants are independent contractors and not officers or employees of the United States Post Office Department. There are written contracts between the appellants and the Postmaster General (see Appendix). These contracts for carrying the mails are let by the Postmaster General under the authority and conditions enacted by Congress. Chapter 12 of Title 39, U.S.C.A. This chapter makes it clear that the carriers are contractors and not employees or officers of the government. Federal principles governing the construction and operation of contracts apply to contracts for carrying the mails. *Huse* v. *U. S.*, 44 Ct. Cl. 19, aff'd. 222 U. S. 496; *U. S.* v. *Utah, Nevada & California Stage Co.*, 199 U. S. 414; 72 C. J. S. 302, Post Office, §27(e); 41 Am. Jur. 753, Post Office, §78.

A contract mail carrier, such as the appellants, is not a direct instrumentality of the government. He is a personal contractor, doing certain work for the government at a fixed compensation. *State* v. *Wiles*, 116 Wash. 387, 199 P. 749. See *State* v. *Boone*, 132 N. C. 1107, 44 S. E. 595; *Sawyer* v. *Corse*, 17 Gratt. (58 Va.) 230.

A contractor does not share any governmental immunity, even though the contract is the means by which the United

States secures construction of its post offices, or transportation of its mails. Cf. *James Stewart & Co.* v. *Sadrakula,* 309 U. S. 94; *Baltimore & A. R. Co.* v. *Lichtenberg,* 176 Md. 383, 4 A. 2d 734, appeal dismissed 308 U. S. 525.

A review of the decisions of this Honorable Court discloses that "the trend of its decisions is not to extend governmental immunity from state taxation and regulations beyond the National Government itself and governmental functions performed by its officers and agents." *Penn Dairies* v. *Milk Control Comm.,* 318 U. S. 261, 270.

The question here involved is similar to that before this Honorable Court in *Alward* v. *Johnson,* 282 U. S. 509. In that case this Court unanimously held that a contract carrier of mail was subject to California's tax upon gross revenues derived from an automotive stage line, over two-thirds of which revenues was derived from carrying the mail. This gross revenue tax was in lieu of all property taxes. This Court held:

> "Nor do we think petitioner's property was entitled to exemption from state taxation because used in connection with the transportation of the mails. There was no tax upon the contract for such carriage; the burden laid upon the property employed affected operations of the Federal Government only, remotely. Union P. R. Co. v. Remiston, 18 Wall 5, 30, 21 L. ed. 787, 791; Metcalf v. Mitchell, 269 U. S. 514, 70 L. ed. 384, 46 S. Ct. 172." (382 U. S. at 514).

In *Alward* v. *Johnson, supra,* this Honorable Court held that the property used by a contract carrier of mail was subject to state taxes and that the gross revenues derived from a contract with the Federal Government could be used

to determine the amount of these taxes. There is but one real difference between *Alward* v. *Johnson* and the instant case. In that case the tax was construed to be a tax on property measured by gross receipts, whereas, in the instant case, we have a highway use tax measured by gross receipts.

In *James* v. *Dravo Contracting Co.*, 302 U. S. 134, this Honorable Court adopted the clear and unequivocal doctrine that an independent contractor with the Federal Government was subject to all state taxes and regulations, unless Congress had specifically provided an exemption. This Court held that West Virginia could levy an occupation tax upon the gross receipts derived from a contract with the United States Government.

In an opinion by Mr. Chief Justice Hughes, this Court held:

> "The tax is not laid upon an instrumentality of the Government. * * * Respondent is an independent contractor. The tax is nondiscriminatory. (302 U. S. at 149)
>
> * * *
>
> "Respondent has no constitutional right to immunity from nondiscriminatory local taxation and the mere fact that the tax in question burdens respondent is no defense. The defense is that the tax burdens the Government and respondent's right is at best a derivative one. He asserts an immunity which, if it exists, pertains to the Government and which the Government disclaims.
>
> "In Alward v. Johnson, 282 U. S. 509, 75 L. ed. 496, 51 S. Ct. 273, 75 A. L. R. 9, supra, as already noted, the tax was upon gross receipts and they were derived from a contract for carrying the mails, but the tax was upheld. It there appeared that the tax was in lieu of taxes upon the property and had been treated by the

State Court as a property tax. But if the tax actually laid upon the gross receipts placed a direct burden upon the Federal Government so as to interfere with the performance of its functions, it could not be saved because it was in lieu of a tax upon property or was so characterized. (302 U. S. at 158).

* * *

"But if it be assumed that the gross receipts tax may increase the cost to the government, that fact would not invalidate the tax. With respect to that effect, a tax on the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract. Concededly, such a tax may validly be laid. Taxes may validly be laid not only on the contractor's machinery but on the fuel used to operate it. * * * The fact that the tax on the gross receipts of the contractor in the Alward Case, supra, might have increased the cost to the government of the carriage of the mails did not impress the Court as militating against its validity." (302 U. S. at 160).

Thus we see that the only distinction between the instant case and *Alward* v. *Johnson, supra,* i.e., that the gross receipts tax was in lieu of all property taxes rather than a highway use tax, was abolished by this Honorable Court in *James* v. *Dravo Contracting Co., supra.*

Governmental immunity from state taxes and regulations does not extend to independent contractors, even if the tax is passed directly to the Federal government under a "cost-plus-a-fixed fee" contract, *Alabama* v. *King & Boozer,* 314 U. S. 1, or even if the taxes or regulations impose an increased economic burden on the Federal government. *Penn Dairies* v. *Milk Control Comm.,* 318 U. S. 261; *Oklahoma Tax Commission* v. *Texas Co.,* 336 U. S. 342; *Esso*

Standard Oil Co. v. *Evans,* 345 U. S. 495; Cf. *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376.

B.

VIRGINIA'S GROSS RECEIPTS ROAD TAX (SEC. 58-638 OF THE CODE OF VIRGINIA) DOES NOT IMPOSE AN UNCONSTITUTIONAL BURDEN ON INTERSTATE COMMERCE.

The tax imposed under § 58-638 of the Code of Virginia is a highway use tax. It is not levied on the entire gross receipts of a carrier of interstate commerce; but only upon that percentage of its gross receipts that the number of miles operated over Virginia highways bears to the total number of miles traveled in interstate operations. It is collected and credited to the Highway Maintenance and Construction Fund. While the business of motor carriers was still in its infancy, this Honorable Court held that a state could tax interstate operations of a motor carrier as well as intrastate operations for the use of the state's highway system. *Hendrick* v. *Maryland,* 235 U. S. 610.

A state may levy a highway use tax on a motor carrier although it engaged exclusively in interstate commerce. *Clark* v. *Poor,* 274 U. S. 554. Such highway use taxes may be based on gross receipts so long as they do not discriminate against interstate commerce. *Aero Mayflower Transit Co.* v. *Board of R. R. Commrs.,* 332 U. S. 495; *Capital Greyhound Lines* v. *Brice,* 339 U. S. 542; *Bode* v. *Barrett,* 344 U. S. 583.

The Commonwealth of Virginia uses the same method of apportioning gross receipts from interstate commerce for levying a highway use tax that this Honorable Court viewed with favor in *Central Greyhound Lines* v. *Mealey,* 334 U. S. 653, 663.

CONCLUSION

For the foregoing reasons, the appellee respectfully submits this Statement showing that the questions upon which the decision in this case depends are so unsubstantial as to obviate further argument, and the appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the order of the court below.

Respectfully submitted,

J. LINDSAY ALMOND, JR.
Attorney General of Virginia

C. F. HICKS
Assistant Attorney General of Virginia

Supreme Court–State Library Building
Richmond 19, Virginia

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Appellee's Statement Opposing Jurisdiction and Motion to Dismiss to Alexander H. Sands, Esq., American Building, Richmond, Virginia, Frank A. S. Wright, Esq., Mutual Building, Richmond, Virginia and Thomas L. Woodward, Esq., Suffolk, Virginia, Counsel of record for the Appellant, on this the 17th day of November, 1955.

C. F. HICKS
Assistant Attorney General

POST OFFICE DEPARTMENT

ASSISTANT POSTMASTER GENERAL

Bureau of Transportation

WASHINGTON 25, D. C.

In reply refer to:
HC:SR:S:IF

June 22, 1953

Charles T. Crowder
Suffolk, Virginia

Dear Sir:

Under the provisions of paragraph (b) of Section 97.29, Postal Laws and Regulations an order has been issued renewing your contract for service on the star route indicated below for an additional term from July 1, 1953, to June 30, 1957, at the rate prevailing on June 30, 1953, subject to any change that may be made in the operation under your current contract.

Renewal contract will be prepared in duplicate and forwarded to your local postmaster for execution by you with good and sufficient sureties. If your recent renewal bond was executed by a surety company the same surety company should be furnished by you as surety on the renewal contract. You should exercise great care to see that these forms are both completely and properly executed and returned to the Department at the earliest practicable date.

No payment can be made for service performed under your renewal contract until after such contract is properly executed and filed in the Department. Therefore, there may be some delay in making payment for service performed during July, but thereafter payments should be received by you at the usual time.

Sincerely yours,

(s) J. C. ALLEN
Assistant Postmaster General.

Route No. and Termini: 14549, Part A: Danville to Suffolk;
Part B; Danville to Boydton;
Part C: Danville to Emporia;
Part D: Emporia to Suffolk, Virginia.

App. 2

RENEWAL CONTRACT FOR MAIL SERVICE

ROUTE NO. **14549** CONTRACTOR'S ADDRESS { **P. O. Box 752, Suffolk** STATE OF **Virginia**

THIS CONTRACT, Made the **22nd** day of **June**, nineteen hundred and fifty-three, between the UNITED STATES OF AMERICA (acting in this behalf by the Postmaster General) and **Charles T. Crowder**, contractor, and **Peerless Casualty Company**, of **Keene, N. H.**, as his sureties:

WITNESSETH, That whereas **Charles T. Crowder** is the contractor for transporting the mail on Route No. **14549** between **Part A: Danville and Suffolk; Part B: between Danville and Boydton; Part C: between Danville and Emporia and Part D: between Emporia and Suffolk,** State of **Virginia**, pursuant to a contract with the UNITED STATES OF AMERICA, for a term ending June 30, 1953, and whereas said contractor has proposed and the Postmaster General has accepted a renewal of the above-mentioned contract for a term from July 1, 1953, to June 30, 1957, pursuant to Public Law 669, approved June 19, 1948:

NOW, THEREFORE, the UNITED STATES OF AMERICA, on the one hand, and the contractor and the sureties, jointly and severally, on the other hand, do mutually undertake, covenant, and agree as follows:

1. The term of this contract shall be for the period beginning the first day of July, 1953, and ending June 30, 1957.

2. All covenants, conditions and stipulations contained in or forming a part of the above-mentioned contract (as it may have been or may be modified) are incorporated herein and make a part hereof.

3. Payment to the contractor for services performed hereunder shall be at the rate prevailing at the end of the term of the above-mentioned contract, subject to all the conditions contained therein.

4. In addition to any readjustment of compensation provided for in such contract, the Postmaster General may, in his discretion and under such regulations as he may prescribe, with the consent of the contractor, readjust the compensation payable hereunder for increased or decreased costs occasioned by changed conditions occurring during the contract term, which, in the opinion of the Postmaster General, could not reasonably have been anticipated at the time of the execution by the contractor of the renewal proposal and bond for this contract.

5. The contractor warrants that he has not employed any person to solicit or secure this renewal contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

6. That in the employment of such help as may be necessary, no discrimination shall be made because of race, creed, color, or national origin, in the fulfillment of the contract, and shall include a similar provision in all subcontracts.

IN WITNESS WHEREOF, That said Postmaster General has caused the seal of the Post Office Department to be hereto affixed, and has caused the same to be attested by the signature of the Assistant Postmaster General, and the said contractor and his sureties have hereunto set their hands and seals the day and year set opposite their names, respectively.

Signed, sealed, and delivered this **7th** day of **August** , 19 **53** , by the Assistant Postmaster General in the presence of—

BY ORDER OF THE POSTMASTER GENERAL:

(s) Alice M. Wenger

(s) J. C. Allen
Assistant Postmaster General.

NOTE.—Be careful to write the date you sign opposite signature.

[SEAL]

Signed this **7th** day of **July** , 19 **53** **(s) Charles T. Crowder** , *Contractor*

(s) W. C. Gatling
(s) James L. Ward } Witnesses to signature of contractor.

Signed this ..... day of ....., 19 .... **Peerless Casualty Company** [SEAL]

Signed this **9th** day of **July** , 19 **53** **(s) Dorothy V. Carvin** [SEAL]
Attorney in Fact

} *Sureties.*

(s) James L. Ward
(s) W. C. Gatling } Witnesses to signatures of sureties. **(s) Virginia H. Sandel**
(s) Oscar M. Cassady

NOTE.—There must be two witnesses to the signature of the contractor, and two witnesses to the signatures of the sureties. The two witnesses to the signature of the contractor may also witness the signatures of the sureties. A married woman may be accepted as surety in cases where the laws of the State in which the contract is executed permit her to enter into contracts generally as freely as though she were unmarried. If a female be offered as surety it must be stated whether she is married or unmarried.

NOTE.—The following certificate must be signed by a postmaster or a duly appointed acting postmaster, *and not by any other person*, but is not required when a surety company qualifies as surety.

POST OFFICE: ....., STATE OF .....

....., 19.....

I HEREBY CERTIFY that ....., of .....,

State of ....., and .....,

of ....., State of .....,

are good and sufficient sureties for the amount of the foregoing contract, and I also certify that the sureties are, each and all of them, over 21 years of age, and that neither of them is a postmaster, assistant postmaster, clerk in a post office, rural delivery carrier or other postal employee, or a member of the immediate family of a postmaster or an assistant postmaster.

.....

Postmaster.

CERTIFICATE OF THE OATH OF MAIL CONTRACTORS
REQUIRED BY LAW
(Take this Oath after signing the foregoing Contract)

NOTE.—This oath may be administered by a postmaster or a duly appointed acting postmaster, but NOT by a deputy, assistant postmaster or by a clerk.

When an indemnity company is to become sole surety this oath should be administered before sending the contract to the surety company for completion.

When the oath is taken before a justice of the peace, or any other officer not using a seal, except a judge of a United States court, the certificate of the clerk of a court of record must be added, under his seal of office, that the person who administered the oath is duly qualified as such officer. If the oath is taken before a notary public and his seal is affixed, the certificate of the clerk of a court is not necessary.

I, the undersigned, being employed in the care, custody, and conveyance of the mail as Contractor on the route named in the foregoing contract, do solemnly swear ..... that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of Post Offices and Post Roads within the United States; and that I will honestly and truly account for and pay over any money belonging to the said United States which may come into my possession or control. And I also further swear ..... that I will support the Constitution of the United States: SO HELP ME GOD.

STATE OF **Virginia**
COUNTY OF **Nansemond** } *ss:*

(s) Charles T. Crowder
Contractor.

Sworn before the subscriber, postmaster at **Suffolk** , State of **Virginia** , this **7th** day of **July** , A. D. 19 **53** and I also certify that the person above named is not a postmaster, assistant postmaster, a clerk employed in a post office, rural delivery carrier or other postal employee, nor a member of the immediate family of a postmaster, or assistant postmaster, and is, to the best of my knowledge and belief, above the age of 21 years.

(s) S. S. Stallings
Postmaster at **Suffolk, Va.**

CONTRACT FOR MAIL SERVICE

(GENERAL ADVERTISEMENT)

Route No. **14549** *Contractor's Address* { **Suffolk** / *State of* **Virginia**
Annual rate of pay, $ **10,999.99**

THIS ARTICLE OF CONTRACT, Made the **28th** day of **March** , nineteen hundred and forty-five, between the UNITED STATES OF AMERICA (acting in this behalf by the Postmaster General) and **Charles T. Crowder** , contractor and **National Surety Corporation** , of **New York City, New York** as his sureties:

WITNESSETH, That whereas **Charles T. Crowder** has been accepted, according to law, as contractor for transporting the mail on Route No. **14549** from

Part A:

Danville,

by Turbeville, Alton, Harmony, Denniston, Mayo, Christie, Virgilina, Nelson, Buffalo Junction, Clarksville, Jeffress, Finchley, Boydton, Baskerville, Union Level, South Hill, Lacrosse, Lacrosse Railroad station (S.A.L.), Brodnax, Charlie Hope, Lawrenceville, Edgerton, Freeman, Radium, Emporia, Emporia Railroad station (A.C.L.), Adams Grove, Drewryville, Capron, Courtland, Franklin and Holland,

to Suffolk, Virginia, and back, six times a week.

Part B:

From Danville,

by Turbeville, Virgilina, Nelson and Clarksville,

to Boydton, Virginia,

and back **once** a week, **box delivery and collection service not required on either part,**

at the rate of **Ten thousand nine hundred and ninety-nine and 99/100** dollars per annum, for and during the term beginning the first day of July, nineteen hundred and forty-five, and ending June thirty, nineteen hundred and forty-nine. Now, therefore, the said contractor and his sureties do, jointly and severally, undertake, covenant, and agree with the United States of America, and do bind themselves—

1st. To carry said mail with certainty, celerity, and security, using therefor such means as may be necessary to transport the whole of said mail in accordance with specification in the advertisement, whatever may be its size, weight, or increase due to any cause, during the term of this contract, and by the schedule of departures and arrivals stated in the advertisement under which this contract is made, and within the running time fixed therein; and so to carry until said schedule is altered by the authority of the Postmaster General of the United States, as hereinafter provided, and then to carry according to such altered schedule (*Provided,* That when more than ten minutes are taken for opening and closing the mails at any intermediate office, the additional time so taken is to be allowed in addition to the time fixed in said schedule: *And provided further,* That, if available, motor vehicles shall be used when road and weather conditions permit, reasonable additional running time to be allowed for use of other mode of conveyance when road or other conditions preclude use of motor vehicles); and in all cases to carry said mail in preference to passengers and freight, and to their entire exclusion if its weight, bulk, or safety shall so require.

2d. To carry the mail in a safe and secure manner, properly protected under a sufficient rubber, oilcloth, or canvas to prevent it from becoming wet or otherwise injured.

3d. To take the mail and every part thereof from, and deliver it and every part thereof at, each post office on the route, both going and returning, unless otherwise stated, or that may hereafter be established on the route (or on any route that may hereafter be established, and to which this contract may be extended, as hereinafter provided), and into the post office at each end of the route, and into the post office, if one is there kept, at the place at

which the carrier stops for the night; and if no post office is there kept, to lock it up in some secure place, at the risk of the contractor, and to carry the mails over the road on which the former carrier traveled, unless otherwise stated, and in the event that no service has previously been performed on the route, to travel the shortest public road between the points named, unless otherwise stated or ordered by the Department.

4th. To take any mail matter or private mail satchels that may be tendered outside of the usual mail bag from any post office now on the route, or that may hereafter be established on the route, and carry the same to, and deposit into, the proper boxes, or hang the mail satchels on the proper mail cranes, now on or that may hereafter be placed on the line of the route for this purpose (or on any route that may hereafter be established and to which this contract may be extended as hereinafter provided), when requested so to do; also to collect the mail from the boxes (when a signal is displayed to indicate that a box contains mail to be taken) and to deposit the same in the next post office at which the carrier arrives, and to take the mail satchels when they are used, either with or without mail, from the mail cranes and carry them to the post office; also to deliver and collect the mail of each patron who has provided a box or a satchel when such mail cannot be contained in the receptacle, as contemplated by the terms of the advertisement pursuant to which this contract is made.

5th. To be accountable and answerable in damages for the person to whom the said contractor shall commit the care and transportation of the mail, and his careful and faithful performance of the obligations assumed herein, and those imposed by law; not to commit the care or transportation of the mail to any person under eighteen years of age, or any person undergoing a sentence of imprisonment at hard labor imposed by a court having criminal jurisdiction, nor to any person who has not sufficient intelligence properly to handle and deposit the mail for boxes along the route; nor to any person not authorized by law to be concerned in contracts for carrying the mails; to discharge any carrier of said mails whenever required so to do by the Postmaster General; not to carry, otherwise than in the mail, letters, packets, or newspapers which should go by mail, or convey or transport any person engaged in carrying letters, packets, or newspapers which should go by mail; to carry post-office blanks, mail locks and bags, and other postal supplies, and also the post-office inspectors and other special agents of the Post Office Department on the exhibition of their credentials, if a coach or other suitable conveyance is used, without additional charge.

For which services, when performed, and evidence thereof shall have

been filed with the Postmaster General, the said contractor is to be paid by the United States at the rate per annum hereinbefore named; payments to be made monthly, and as soon after the close of each month as accounts can be adjusted and settled; said pay to be subject, however, to be reduced or discontinued by the Postmaster General, as hereinafter stipulated, or to be suspended in case of delinquency.

It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service, in accordance with law, he allowing not to exceed a pro rata increase of compensation for any additional service thereby required; and, in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor, one month's extra pay on the amount of service dispensed with, and not to exceed a pro rata compensation for the service retained; but no increase of compensation shall be allowed for a change of service not amounting to an increase, nor indemnity of month's extra pay for any change of service not involving a decrease of service.

It is hereby also stipulated and agreed by the said contractor and his sureties that whenever, in the opinion of the Postmaster General, it shall become necessary to increase the speed upon which the mail is carried, the service shall be readvertised for the reduced running time required: *Provided*, That the contractor, with the consent of his sureties, shall, subject to all the conditions hereinbefore and hereinafter stipulated, have the option of continuing service upon the expedited running time without additional compensation therefor; and in case the contractor, with the consent of his sureties, shall have signified his desire to continue the service upon the reduced running time, and an order shall have been made in pursuance thereof, he shall, if required by the Postmaster General, perform the expedited service subject to all the conditions hereinbefore and hereinafter stipulated, until the termination of his contract in like manner as if such expedited service had been the original covenant.

It is hereby also stipulated and agreed by the said contractor and his sureties as aforesaid that he shall forfeit—

1st. The price of a trip when it is not run, and in addition, if the failure is occasioned by the fault of the contractor or carrier, an amount not more than three times the price of the trip.

2d. For violating any of the foregoing provisions as to giving preference to passengers or freight over the mail or any portion thereof, or leaving the same for their accommodation; carrying, otherwise than in the mail, matter

which should go by mail; or transporting persons engaged in so doing, with knowledge thereof, a penalty not to exceed one-fourth of the annual pay.

3d. For the loss of, or depredation upon, a mail pouch in the custody of a contractor, a penalty in a sum not to exceed one and one-fourth times the value of the contents lost thereby: *Provided,* That the loss is occasioned by the fault of the contractor or his agent.

4th. For violating any other provision of this contract touching the carriage of the mails, or the time and manner thereof, without a satisfactory explanation of the delinquency, in due time, to the Postmaster General, a penalty in his discretion. That these forfeitures may be increased into penalties of a higher amount in the discretion of the Postmaster General, according to the nature or frequency of the failure and the importance of the mail: *Provided,* That, except as herein otherwise specified, and except as provided by law, no penalty shall exceed three times the pay of a trip in each case.

And it is hereby further stipulated and agreed by the said contractor and his sureties that the Postmaster General may annul the contract or impose forfeitures in his discretion for repeated failures or for failure to perform service according to contract; for violating the postal laws or regulations; for disobeying the instructions of the Post Office Department; for refusing to discharge a carrier, or any other person having charge of the mail by the contractor's direction, when required by the Department; for subletting service without the consent of the Postmaster General, or assigning or transferring this contract; for combining to prevent others from bidding for the performance of postal service; for transmitting matter which should go by mail, contrary to the stipulations herein; for transporting persons so engaged as aforesaid; or for the failure of the contractor to reside upon or contiguous to the route and to give his personal supervision to the performance of the service; that the Postmaster General may annul the contract whenever the contractor shall become a postmaster, assistant postmaster, or Member of Congress, or otherwise legally incompetent to be concerned in such contract; and whenever in the opinion of the Postmaster General, the service cannot be safely continued, the revenues collected, or the laws maintained on the road or roads herein.

And it is hereby further stipulated and agreed by the said contractor and his sureties—

1st. That such annulment shall not impair the right to claim damages from said contractor and his sureties under this contract, but such damages may, for the purpose of set-off or counterclaim, in the settlement of any

claim of said contractor or his sureties against the United States, whether arising under this contract or otherwise, be assessed and liquidated.

2d. That, within the meaning of this contract, foreign mails in transit across the territory of the United States shall be deemed and taken to be mails of the United States.

3d. That this contract may, in the discretion of the Postmaster General, be continued in force beyond its express terms for a period not exceeding six months, until a new contract with the same or other contractors shall be made by the Postmaster General.

4th. That no Member of or Delegate to Congress shall be admitted to any share or part of this contract or agreement, or to any benefit to arise therefrom.

5th. The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

6th. That the contractor shall faithfully discharge all other duties and trusts imposed upon him either by law, by the rules and regulations of the Post Office Department, or by the advertisement pursuant to which this contract is made, and shall faithfully account for, deliver and pay over to the proper official or person, all moneys, mail matter, and other property of every kind which shall come into the possession of said contractor.

7th. To refund any overpayment for service performed or any payment for service not rendered.

8th. That in the employment of such help as may be necessary, no discrimination shall be made because of race, creed, color, or national origin, in the fulfillment of the contract, and shall include a similar provision in all subcontracts.

IN WITNESS WHEREOF, That said Postmaster General has caused the seal of the Post Office Department to be hereto affixed, and has caused the same to be attested by the signature of the Second Assistant Postmaster General, and the said contractor and his sureties have hereunto set their hands and seals the day and year set opposite their names, respectively.

Signed, sealed, and delivered this **17th** *day of* **May** *, 1945, by the Second Assistant Postmaster General in the presence of—*

BY ORDER OF THE POSTMASTER GENERAL:

(s) Ruth H. Langley

(s) Roy M. Martin
Acting *Second Assistant Postmaster General.*
[SEAL]

NOTE.—Be careful to write the date you sign opposite signature.

Signed this **12** day of **April** , 1945. **(s) Charles T. Crowder** , *Contractor.*

(s) J. L. Farless **311 Linden Ave. Suffolk, Va.**
(s) Hugh T. Daughtrey **413 S. Main St. Suffolk, Va.**
} Witnesses to signature of contractor.

Signed this **18** day of **April** , 1945. **National Surety Corporation** [SEAL]
By: (s) .....
Attorney-in-fact } *Sureties.*

Signed this ..... day of ....., 1945. [SEAL]

(s) Lois Printz
(s) Rhoda Goldstein
} Witnesses to signatures of sureties.

NOTE.—There must be two witnesses to the signature of the contractor, and two witnesses to the signatures of the sureties. The two witnesses to the signature of the contractor may also witness the signatures of the sureties. A married woman may be accepted as surety in cases where the laws of the State in which the contract is executed permit her to enter into contracts generally as freely as though she were unmarried. If a female be offered as surety it must be stated whether she is married or unmarried.

NOTE.—The following certificate must be signed by a postmaster or a duly appointed acting postmaster, *and not by any other person*, but is not required when a surety company qualifies as surety.

POST OFFICE: ....., STATE OF .....
....., 1945.

I HEREBY CERTIFY that ....., of .....
State of ....., and .....
of ....., State of .....
are good and sufficient sureties for the amount of the foregoing contract, and I also certify that the sureties are, each and all of them, over twenty-one years of age, and that neither of them is a postmaster, assistant postmaster, clerk in a post office, rural delivery carrier or other postal employee, or a member of the immediate family of a postmaster or an assistant postmaster.

.....
Postmaster.

CERTIFICATE OF THE OATH OF MAIL CONTRACTORS REQUIRED BY LAW

(Take this Oath after signing the foregoing Contract)

NOTE.—This oath may be administered by a postmaster or a duly appointed acting postmaster, but NOT by a deputy, assistant postmaster, or by a clerk.

When an indemnity company is to become sole surety this oath should be administered before sending the contract to the surety company for completion.

When the oath is taken before a justice of the peace, or any other officer not using a seal, except a judge of a United States court, the certificate of the clerk of a court of record must be added, under his seal of office, that the person who administered the oath is duly qualified as such officer. If the oath is taken before a notary public and his seal is affixed, the certificate of the clerk of a court is not necessary.

I, the undersigned, being employed in the care, custody, and conveyance of the mail as Contractor on the route named in the foregoing contract, do solemnly swear ..... that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of Post Offices and Post Roads within the United States; and that I will honestly and truly account for and pay over any money belonging to the said United States which may come into my possession or control. And I also further swear ..... that I will support the Constitution of the United States: SO HELP ME GOD.

STATE OF **Virginia**
COUNTY OF **Nansemond** } *ss:*

(s) Charles T. Crowder
Contractor.

Sworn before the subscriber, postmaster at **Suffolk** , State of **Virginia** , this **12th** day of **April** , A. D. 1945, and I also certify that the person above named is not a postmaster, assistant postmaster, a clerk employed in a post office, rural delivery carrier or other postal employee, nor a member of the immediate family of a postmaster or assistant postmaster, and is, to the best of my knowledge and belief, above the age of twenty-one years.

(s) S. S. Stallings
Postmaster at **Suffolk, Va.**

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In The
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1955

NO. 494

CHARLES T. CROWDER,
Appellant

v.

COMMONWEALTH OF VIRGINIA,
at the relation of the
STATE CORPORATION COMMISSION,
Appellee

GEORGE H. ELLIS,
Appellant

v.

COMMONWEALTH OF VIRGINIA,
at the relation of the
STATE CORPORATION COMMISSION,
Appellee

BRIEF OF APPELLANTS
OPPOSING APPELLEE'S MOTION TO DISMISS

Having been presented within the Appellee's Motion and more satisfactorily within the Appellants' State-

ment as to Jurisdiction, in accordance with Supreme Court of the United States Rule 40(5), items (a), (b), (c), (d) and a concise statement of the case are not repeated herein for sake of brevity.

I. THE ARGUMENT

A. Postal Service a Federal Function

Among the powers yielded by the several States solely to the Federal Government were those pertaining to interstate commerce and the Postal System, Article 1, Section 8, Clauses 3 and 7, of the United States Constitution.

Pursuant to that authority Congress assumed exclusive jurisdiction over post roads and post routes and provided for the carriage of mail. Title 39, Chapter 14, Sections 481-504, inclusive, U. S. C. A.

In *Aetna Ins. Co.* v. *Ill. Central R. Co.*, 6 N. E. (2d) 189, 365 Ill. 303, reversing 283 Ill. App. 527, Certiorari granted, 57 S. Ct. 939, 301 U. S. 679, 91 L. Ed. 1338. Certiorari dismissed, 58 Sup. Ct. 269, 302, U. S. 652, 82 L. Ed. 505, the Court said:

> "We are of opinion that, when a letter is mailed, it is from then on in the exclusive control of the government; that its transportation, guarding, and delivery are governmental functions; and that whoever performs those functions, whether carefully or otherwise, is in the service of the government. With some distinctions between land grant roads and others, the railroads are required to receive all mailable matter in such containers as the gov-

ernment may provide or prescribe and to handle and transport it in accord with contracts the terms of which are prescribed by law and as directed by federal statute and general orders of the Postmaster General."

The United States, in the handling and carriage of mail, is thus engaged in an exclusive governmental function and of necessity must employ means and services to carry out such functions. Hence in the carriage of mails through the means of motor vehicles owned and operated by the appellants it is engaged in no private function or proprietary capacity but in carrying out a duty with which it alone is charged. In all of such functions it must, of necessity, operate through the services of individuals and other entities.

It may be argued that the tax is assessed against appellants, but that is not true because the tax is levied upon gross receipts from the USE of the means and instrumentalities in carrying the mail, thus is a tax upon the contract itself. If the State may tax the receipts from the exclusive carriage of mail then it may tax to the point of great burden or destruction and thereby increase the cost of carrying the mail and directly force the fixation of postal rates determined by State taxation. The cost of transportation of the mails may then differ in as many states as impose a tax.

If it may assess a gross receipts road tax of two percent it may assess a tax of twenty percent, or may raise the tax to the point of prohibition. If it may tax the instant operations it may tax also rural mail carriers, or parcel post, or special delivery, or the vehicles of any department of the government. If it may tax the United States mail regardless of origin and termini it may like-

wise burden the interstate transit and transport thereof. For no one can say that a mail sack originating in Suffolk and terminating in Bristol, or Danville, does not carry mail for rural routes running into Tennessee, or North Carolina, or that the contents are not redistributed or redispatched to Utah or New Zealand along with other mail collected.

B. Immunity from State taxation of means and instrumentalities employed by the Federal Government to carry on its functions

In *McCulloch* v. *Maryland,* 17 U. S. 316, 4 L. Ed. 579, Chief Justice Marshall stated succinctly that the Constitution implied immunity from State taxation of means and instrumentalities employed by the Federal Government to carry on its functions. Said the Court:

> "The taxing powers of a state are limited to persons and property located and acts performed within its jurisdiction. *The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission, but it does not extend to those means which are employed by Congress to carry into execution the powers conferred upon that body by the constitution of the United States.* It is consequently well settled that a state has no power to tax the means and instrumentalities which the federal government employs to carry on its proper functions. If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent

rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states." (Italics supplied).

* * * * * * * * *

"The sovereignty of a state extends to every thing which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution—powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them."

C. The obligation to pay for use of the highways

The Commonwealth has taken the position that it is entitled to charge transporters of mail for the use of the highways. The same argument could be advanced for the transportation of any Government property, cannons, ammunition, mail, supplies, money, currency,

or the operation of any vehicle, until each State became a port of entry.

This argument is fallacious and without merit in that all Federal aid to highways stems from the Federal Aid Act of July 11, 1916, c. 241, 39 Stat. 355, and from the Act of November 9, 1921, c. 119, which is entitled "An Act To amend the Act entitled 'An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes,' approved July 11, 1916, as amended and supplemented, and for other purposes," and from this Act to the present Acts, constituting Federal aid to highways, (Title 23, U. S. C. A.) all such aid has been provided by the Federal Government as could reasonably be required of it to pay its way for the use of State highways for postal service and transport.

It cannot be said then that the State is equitably or legally entitled to any contribution by levy upon the gross receipts from the carriage of United States mail over the highways.

Conceivably, and probably, if the Commonwealth of Virginia can lay a tax upon the gross receipts from the carriage of the United States mail,—and such carriage does not depend on whether it is interstate or intrastate, —then the way is open to every State in the Union to lay a similar tax and thereby drive the highway transportation of mail from the roads.

D. The tax is a privilege tax regardless of its designation

It will be observed that under Section 58-638 of the Code of Virginia, *supra*, the tax is two percentum of the

gross receipts upon the *operations* of a motor vehicle for transportation of property "*in addition* to any other fees and taxes imposed by law upon motor vehicles, trailers and semi-trailers, *and upon the operation thereof*, and *in addition* to any motor fuel tax paid or payable by such person, a road tax calculated on the gross receipts derived from such operaitons * * * ". (Italics supplied).

It is strictly then a tax on the privilege of the use of the highways notwithstanding allocation of the taxes so collected. It is moreover a tax on gross income from the transportation of mail and falls in the same category as gross income derived from transportation in interstate commerce, because the carriage of mail is strictly a governmental function exclusively that of the United States. The freedom of the mails is a vital and indispensable part of the economic life and political existence of the United States. The powers to keep the channels of interstate commerce open and to provide for the uninterrupted and continuous carriage of United States mail were cardinal parts of the adoption of our Constitution.

The tax here is not upon the property used in carrying out a Government function, but upon the operations necessary therefor, and hence, upon the operation itself.

This Court has consistently distinguished between a tax upon property and the agency used to carry out a Government operation, so long as the tax did not affect the operation itself, but in no case has this Court ever held a tax upon the gross income derived from performing a Governmental function to be valid.

This Court has ever been careful to protect interstate commerce, *a fortiori*, should it protect the carriage of the United States mail from a tax which may, by the ukase or

ill-advised Legislation of some State, subject it to a tax burdensome in carrying out of the Governmental function itself.

Nor will this Court be misled by any name or construction put upon the Act in question by administrative agencies, legislatures or lower Courts, and the statute in question is the type the constitutional significance of which this Court has consistently reserved unto itself. *Galveston H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217 (1908); *Wagner* v. *City of Covington*, 251 U. S. 95 (1919); *Storaasli* v. *Minnesota*, 283 U. S. 57 (1931); *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435 (1940).

The Virginia Supreme Court has used *Alward* v. *Johnson*, 282 U. S. 539, 51 S. Ct. 273, 75 L. Ed. 496, as practically its sole authority for its decision upholding the validity of Section 58-638 of the Code, and consequently the tax upon the operations of appellants in carrying the mail. This is, however, a very slender reed upon which to rest because the decision rests upon a tax upon *property exclusively* and consequently has no relevency to the issue here.

There are many distinctions to be drawn between the Alward case and the case at bar.

(1) Alward was a common carrier of persons and property and as such compelled to operate on fixed routes, between fixed termini, on non-discriminatory rates, whether he carried mail or not, consequently the carriages of mail was a mere incident to his operations.

(2) The mail contract was not the cause for the operations.

(3) The tax was held to be *"essentially one on property"*.

(4) The tax was "in lieu of all other taxes and licenses, state, county and municipal, *upon the property* above enumerated of such companies * * * ".

(5) *"There was no tax upon the contract for such carriage; the burden laid upon the property* employed affected operations of the federal government only remotely."

(6) The gross receipts road tax in Virginia is not in lieu of all other taxes, nor a tax on property, but is a gross receipts tax *upon operations* by its very terms.

(7) Appellants are neither common nor contract carriers.

(8) Appellants are engaged in no transportation except for the Post Office Department.

(9) Appellants' entire gross receipts are from the Post Office Department.

(10) The tax presently in issue would substantially interfere wtih the postal system and interstate commerce.

(11) Appellants' operations do not fall within the sphere of a utilities or public service commission; they are not subject to the orders or decrees of such with respect to equipment, rates, schedules or load; consequently, in no category may it be said that the Alward case is any authority whatever for the decision of the Commission in the case at bar, or that of the Virginia Supreme Court.

It is therefore respectfully submitted that the instant question concerning the carriage of United States mail has never been presented to any court before and that this Honorable Court is not bound by the decision of the Virginia court in defining the nature of the tax under review and should determine for itself its effect and whether it constitutes a burden on interstate commerce or a governmental function when applied to appellants.

E. Pertinency of cases involving a tax on gross receipts from Interstate Commerce

As stated, there are no cases concerning a tax upon the gross income from the carriage of United States mail, but those cases dealing with a tax upon the privilege of engaging in interstate commerce and hence upon the carriage itself are apropos. If this Court has held that interstate commerce is exempt from direct tax on gross receipts derived from interstate commerce, with even greater force it should hold invalid a direct tax on gross receipts from the carriage of United States mail.

There are numerous cases in which a tax, on *gross* receipts and a similar tax on the carriage of persons and property have been held to be *privilege*,—and consequently an invalid,—tax rather than property tax.

In *New Jersey Bell Telephone Co.* v. *New Jersey*, 280 U. S. 338 (1930), a telephone company, part of the business of which was in interstate and foreign commerce, was taxed *ad valorem* on its real and personal property and was subjected to a franchise tax of 5% of the gross receipts apportioned to New Jersey. The statute called the tax a *franchise* or privilege tax and the state sought to support it as a tax on *property* represented by the value of the company's franchise. The Court held that it was not a property tax:

> "We think it very plain that the exaction is not a tax on property nor in substitution for or in lieu of a property tax. Within the rule heretofore applied in this Court the exaction is a direct tax on gross receipts derived from appellant's interstate commerce and, as

to that part at least, is void. *Philadelphia Steamship Co.* v. *Pennsylvania,* 122 U. S. 326, 345. *Galveston, H. & S. A. R. Co.* v. *Texas, supra,* 227. *Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298. *U. S. Express Co.* v. *Minnesota,* 233 U. S. 335. *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 295, 297. *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450. *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321, 329. *Pullman Co.* v. *Richardson, supra.*" (p. 349).

Of especial significance is *American Barge Line Co.* v. *Koontz,* 68 S. W. (2d) 56 (W. Va. 1951), in which the Supreme Court of that State held that an annual *privilege* tax based on *gross* income from the business of transporting passengers and freight by steamboat was clearly a privilege tax on interstate commerce in contravention of the Commerce Clause of the Federal Constitution. This case represents the reverse of the conclusions of the Supreme Court of Appeals of Virginia in the case at bar and so presents a conflict between the respective Supreme Courts of the two states which should be resolved by this Court so that uniformity of taxation will be achieved.

In *Ohio Tax Cases,* 232 U. S. 576 (1914), the Supreme Court held that a tax on gross intrastate earnings of railway companies, in addition to the taxes on their property, was a *privilege* or *occupation* tax and not a *property* tax, and in *Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298 (1912) a gross receipts tax on public service corporations, including express companies, was held not to be a tax upon the property of express companies.

In *Spector Motor Service* v. *O'Connor,* 340 U. S. 602, 95 L. Ed. 573, 71 S. Ct. 508, where a foreign corporation

qualified to do business in Connecticut by filing the necessary papers with the Secretary of State, leased and utilized terminals in Connecticut, employed twenty-seven full time workers at New Britain, with a salary of $1,200.00 per week, owned and operated pickup trucks registered in its name, which it used to pick up and concentrate freight by the use of Connecticut highways as an incident to its interstate transportation business and the State of Connecticut sought to collect an annual tax, or excise, upon its franchise, for the privilege of carrying on or doing business within the state, "such tax to be measured by the entire net income as herein defined received by such corporation, or association, *from business transacted within the State* during the income year and to be assessed at the rate of *2%*; * * * " it was *Held*, that the tax was violative of interstate commerce clause as a tax upon the right to engage in interstate commerce and therefore was invalid. (Italics supplied).

In *Pullman Co.* v. *Richardson, Treasurer*, 261 U. S. 330, 67 L. Ed. 683, 43 S. Ct. 366, a case which is very much in point, Mr. Justice Van Devanter, said:

> "A state can neither tax the act of engaging in interstate commerce nor lay a tax on gross receipts therefrom. In either case the tax would be a restraint or burden on such commerce, and its imposition an invasion of the power of regulation confided to Congress by the commerce clause of the Constitution."

In *Joseph* v. *Carter & Weekes Stevedoring Co.*, (1947) 330 U. S. 422, 91 L. Ed. 993, 67 S. Ct. 815, where the City of New York attempted to levy a percentage tax on gross receipts from stevedoring it was *Held*, that the tax was invalid as restrictive of interstate commerce.

In *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555, 69 L. Ed. 439, 45 S. St. 184, appellant, a Maryland Corporation, owned and operated a pipe line extending from within Oklahoma through Missouri to a point in Illinois, through which oil was conducted to Illinois and there delivered. It maintained an office in Missouri where it kept its books, paid its employees within and without the State, purchased supplies, employed labor, entered into contracts for transportation of crude oil, maintained three pumping stations in Missouri to speed passage of the oil and carried on various other activities in furtherance of its interstate business. Appellant paid general property taxes on that portion of its line in Missouri. The State of Missouri attempted to collect an annual franchise tax on one-tenth of one percent of the par value of its capital stock and surplus employed in business in the State, deemed "that portion of its entire capital stock and surplus that its property and assets in this State bear to all its property and assets wherever located". It was *Held* that the tax was invalid as a tax on interstate commerce.

F. The Basic Error of the Supreme Court of Appeals of Virginia

The lower Court erred in its failure to draw the proper distinction between those instrumentalities through which the Government immediately and directly exercises its sovereign powers and those which are incidental and have slight relation to Governmental operations.

Metcalf and Eddy v. *Mitchell*, 269 U. S. 514, 70 L. Ed. 384, 46 S. Ct. 172, serves to bring under scrutiny the distinction which appellants assert free them from the payment of State tax on gross income received from the *per-*

formance of a governmental function under the direction and control of the Postmaster General.

Factually, the case involves the assertion of consulting engineers on water and sewerage projects, to states and subdivisions, of their right to recover income taxes on their earnings, paid under protest, which they claimed to be exempt. The Court very properly *Held* that they were *not officers or agents, or under the control of the various states and municipalities and therefore were not exempt.*

Said Mr. Justice Stone, in delivering the opinion of the Court:

> "So far as appears, they were in the position of independent contractors. *The record does not reveal to what extent, if at all, their services were subject to the direction or control of the public boards or officers engaging them.* In each instance *the performance of their contract involved the use of judgment and discretion on their part* and they were required to use their best professional skill to bring about the desired result. *This permitted to them liberty of action which excludes the idea that control or right of control by the employer which characterizes the relation of employer and employee and differentiates the employee or servant from the independent contractor.* (Citing cases).
>
> "We pass to the more difficult question whether Congress had the constitutional power to impose the tax in question, and this must be answered by ascertaining whether its effect is such as to bring it within the purview of those decisions holding that the very nature of our constitutional system of dual sovereign governments is such as impliedly to prohibit the federal government from taxing the instrumentalities of

a state government and in a similar manner to limit the power of the states to tax the instrumentalities of the federal government. (Citing cases).

"*Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of the other.* Thus the employment of officers who are agents to administer its laws (*Collector* v. *Day; Dobbins* v. *Commissioners of Erie County, supra*), its obligations sold to raise public funds (*Weston* v. *City Council of Charleston, supra; Pollock* v. *Farmers' Loan & Trust Co., supra*), its investments of public funds in the securities of private corporations, for public purposes (*United States* v. *Railroad Co., supra*), surety bonds, exacted by it in the exercise of its police power (*Ambrosini* v. *United States, supra*), are all so intimately connected with the necessary functions of government, as to fall within the established exemption; and *when the instrumentality is of that character, the immunity extends not only to the instrumentality itself but to income derived from it* (*Pollock* v. *Farmers' Loan & Trust Co., Gillespi* v. *Oklahoma, supra*), and forbids an occupation tax imposed on its use (*Choctaw, O. & Gulf R. R. Co.* v. *Harrison, supra*). And see *Dobbins* v. *Commissioners of Erie County, supra.*

"When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit, in his

dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. (Citing cases).

"*As cases arise, lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance.* But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirements of our Constitutional system that the federal government must exercise its authority within the territorial limits of the states; and it rests on the conviction that each government in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other. (Citing cases).

"*While it is evident that in one aspect the extent of the exemption must finally depend upon the effect of the tax upon the functions of the government alleged to be affected by it, still the nature of the governmental agencies or the mode of their constitution may not be disregarded in passing on the question of tax exemption; for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government, that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power.*

"*It is on this principle that*, as we have seen, *any taxation by one government* of the salary of an officer of the other, or the public securities of the other, or *an agency created and controlled by the other, exclusively to enable it to perform a governmental function* (*Gillespi* v. *Oklahoma, supra*), *is prohibited.* But *here the tax is imposed on the income of one who is neither an officer nor an employee of government* and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike a contract to sell and deliver a commodity. The tax is imposed without discrimination upon income whether derived from services rendered to the state or services rendered to private individuals. In such a situation it cannot be said that the tax is imposed upon an agency or government in any technical sense, and the tax itself cannot be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way. (Citing cases).

* * * * * * *

"*These statements we deem to be equally applicable to private citizens engaged in the general practice of a profession or the conduct of a business in the course of which they enter into contracts with government from which they derive a profit. We do not suggest that there may not be interferences with such a contract relationship by means other than taaxtion which are prohibited. Railroad Co.* v. *Peniston, supra*, at page 36, recognizes that there may. *Nor are we to be understood as laying down any rule that taxation might not affect agencies of this character in such a manner as directly*

to interfere with the functions of government and this be held to be void." (Italics supplied).

It need hardly be said that the carriage of United States mail is intimate, direct and a necessary function of the United States Government. If this be the fact, and it is, then the tax asserted by the Commonwealth of Virginia cannot be sustained.

The Virginia Supreme Court held that the appellants were independent contractors. This, however, could not be true, because their contracts must be performed under the supervision and control of the Postmaster General, they must give the operations their personal supervision, they must live contiguous to the routes, the contracts may not be assigned and are therefore personal, and the services performed must be in accordance with the Postal Laws and Regulations.

One is an independent contractor when he may perform the services and do the work contracted for as befits him, or suits his purpose, or convenience, and to whom the employer only looks for results. He is a free agent which is the very antithesis of the postal contract in issue since the appellants are always within the jurisdiction and under the direction, control and supervision of the Post Office Department as to routes, methods, schedules, time, equipment, supervision, and every phase of the operation, and in so engaging appellants are operating functionaries of the United States Government.

If appellants are in fact engaged in carrying out a governmental function under the direction and control of the Postmaster General and subject to Postal Laws and Regulations the gross receipts from the carriage

may not be taxed upon any guise whatever. No State has yet had the temerity to assess a gross receipts road tax resulting from the use of vehicles engaged exclusively in carrying the mail. Whatever the category in which the appellants may be placed if their operations are directly tied up with an essential function of the United States Government they are the alter ego of the Government and immune from the tax sought to be imposed.

It is certainly remarkable that in the twenty-five years of operation by Mr. Crowder the State has just reached consciousness with respect to carriers of mail on the highways and byways of Virginia. It has either considered such carriage as exempt or convicts itself of an oversight resulting in substantial loss.

CONCLUSION

It is, therefore, submitted that Section 58-638 of the Code of Virginia provides for a tax which is essentially one on the privilege of operating motor vehicles over the highways of Virginia in performance of a Federal Governmental function; that it is in its essence a tax upon gross receipts from the carriage of United States mail, both intrastate and interstate, and a tax upon the agreement itself between appellants and the Postmaster General.

For the foregoing reasons, appellants respectfully submit that the judgments appealed from should be reversed and the statute as construed by the Virginia

Court and applied to appellants declared unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Brief of the Appellants Opposing Appellee's Motion to Dismiss to J. Lindsay Almond, Jr., and C. F. Hicks, Counsel of record for the Appellee, on this 8th day of January, 1956.

FRANK A. S. WRIGHT,
Of Counsel for Appellants.

No. 494. CROWDER ET AL. *v.* VIRGINIA EX REL. STATE CORPORATION COMMISSION. Appeal from the Supreme Court of Appeals of Virginia. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Alexander H. Sands, Sr.* and *Frank A. S. Wright* for appellants. *J. Lindsay Almond, Jr.*, Attorney General of Virginia, and *C. F. Hicks*, Assistant Attorney General, for appellee. Reported below: 197 Va. 96, 87 S. E. 2d 745.